

G.T.A. Enterprises, Inc. d/b/a "Restaurant Horikawa" and Hotel and Restaurant Employees and Bartenders Union, Local 11, AFL-CIO. Cases 21-CA-18082, 21-CA-18234, 21-CA-18392, and 21-RC-15974

February 12, 1982

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 2, 1980, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

1. The complaint includes two allegations of illegal surveillance by Respondent prior to the election: (1) that Respondent followed various employees about the premises; and (2) that Respondent closely attended known union activists during their meal break. The Administrative Law Judge recommended that allegation (1) be dismissed on the ground that the supporting testimony was one of "subjective impression";² however, he recommended that allegation (2) be affirmed, finding that the supporting testimony was based on "objective observations." Respondent contends that this incident also is based on subjective evidence. We find merit in this contention. It is clear from the record that the testimony offered in support of both allegations was composed of the "subjective impressions" of the witnesses rather than a factual recitation based on events. Accordingly, we shall dismiss the violation based on Respondent's alleged shadowing of union activists during the meal break, as well as the allegation of surveillance based upon its purported following of employees around the premises.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² No exception was taken to this finding.

2. The Administrative Law Judge found that employee Lucien Kubota's participation in the demonstration which took place inside Respondent's restaurant on October 27, 1979,³ was protected under the Act, that in such context Kubota's misconduct in entering the restaurant without authorization was insufficient to justify her termination, and that it was a violation of Section 8(a)(1) for Respondent to discharge her for her participation in the demonstration. We disagree.

On October 27, 1979, at 5 p.m., a group of 30 persons demonstrated in front of the building in which Respondent's restaurant is located. Of the group, only Kubota, who was on her time off, was an employee of Respondent.⁴ The demonstrators picketed and distributed handbills to inform the public of Respondent's alleged failure to improve working conditions, to protest the discharge of an employee, to raise questions about Respondent's role in the recent arrest of another of its employees, and to object to Respondent's refusal to negotiate with the Union.

At approximately 5:30 p.m. the demonstrators, including Kubota, without permission or invitation, entered the building and went down the stairs and into the restaurant by way of its main entrance. They marched through the reception area where 13 customers were waiting to be seated,⁵ to the administrative offices at the back of the restaurant. There they confronted Restaurant Manager Taki. After a brief exchange between her and some of the demonstrators they turned around and left the restaurant by way of the reception area. Both in entering and leaving the reception area the demonstrators chanted "Horikawa" and some additional words in Japanese. The demonstrators were in the restaurant for 10 to 15 minutes.

On November 1 Respondent discharged Kubota for "direct participation in the mass demonstration in the restaurant premises during active business hours, designed to interrupt and interfere with the business activities of the restaurant, and to discourage customers from patronizing the restaurant."

We agree with the Administrative Law Judge that, while the demonstration was carried on outside the restaurant, the demonstrators, including Kubota, were engaged in protected concerted activity, because the demonstration was related to working conditions at Respondent's restaurant and was in protest of certain of Respondent's unfair labor practices. Unlike the Administrative Law

³ All dates are 1979 unless otherwise stated.

⁴ Two former employees, Sato and Ikuyo, also participated in the demonstration, however, the rest of the demonstrators who entered Respondent's restaurant were strangers to its operation.

⁵ The restaurant was crowded (as was usual on a Saturday night)

Judge, however, we find that Kubota and the other demonstrators lost the protection of the Act when they took their demonstration inside the restaurant.

Not all concerted activity is protected.⁶ Merely because such activity is conducted in furtherance of a labor dispute does not mean that in each and every instance it will enjoy the Act's protection. For example, it will not be protected if conducted in an unlawful or violent manner or as a partial strike or slowdown. Further, where and when it occurs can have a direct bearing on whether it is found to be protected.⁷ Such is the case here, where 30 picket demonstrators, only 1 of whom was an employee of Respondent, descended as a body upon Respondent's facility and, while chanting, jammed into the already crowded restaurant and pushed their way through the reception area to the back and then out again in the same noisy manner. This demonstration lasted 10 to 15 minutes and occurred when customers were in the reception area waiting to be seated and the dining room was full or near capacity. Indeed, the Administrative Law Judge found that this conduct of Kubota and the other demonstrators clearly had an impact on the business operations of Respondent, and that the customers were exposed to the sights and sounds of the demonstrators.

By invading the restaurant en masse and parading boisterously about during the dinner hour when patronage was at or near its peak, the demonstrators seriously disrupted Respondent's business. Clearly, their conduct interfered with Respondent's ability to serve its patrons in an atmosphere free of interruption and unwanted intrusion; and it is likely that such conduct infringed on the customers' dining enjoyment. Such an invasion of an employer's premises might be hard to find warranted even in an industrial setting.⁸ In a restaurant or other retail establishment it is wholly unwarranted and cannot be justified regardless of purpose or origin. This is especially so when it occurs at the height of the retailer's serving the needs or wants of its customers.⁹

⁶ See *Mul Landfill Corporation*, 210 NLRB 167 (1974).

⁷ See *Two Wheel Corp. d/b/a Honda of Mineola*, 218 NLRB 486 (1975).

⁸ Compare *Herbert Bernstein, Alan Bernstein, Laura Bernstein, a copartnership d/b/a Laura Modes Company*, 144 NLRB 1592 (1963).

⁹ Our dissenting colleague claims that our description of the demonstration in the restaurant was "exaggerated" and that the record does not support the conclusion that the restaurant was crowded. The fact remains, however, that there were 13 customers in the reception area waiting to be seated, and the receptionist testified that the restaurant was very busy. Thus, she stated, "I spoke to Sato, who was the only one I recognized besides [Kubota], because he used to work in the teppan room. And he talked to me. I told him that—if they would please leave, because . . . we were real, real busy that night, and I didn't want any problems. And whatever it is they were going to do, to go do it upstairs or outside, and not in the Restaurant." This testimony also supports our conclusion that the invasion of Respondent's restaurant by the demonstrators unduly dis-

The Board has traditionally acknowledged the necessity for applying different rules to retail enterprises from those to manufacturing plants with respect to the right of employees to engage in union activity on their employer's premises. Specifically, the Board has recognized that the nature of retail establishments, including restaurants, requires that an atmosphere be maintained in which customers' needs can be effectively attended to and that, consequently, a broad proscription of union activity in areas where customers are present is not unlawful.¹⁰ As a result, the Board has allowed retail establishments to impose no-solicitation rules which preclude soliciting in areas frequented by customers so as to prevent disruption of the customer-salesperson relationship. See *Marshall Field & Company*, 98 NLRB 88, 92 (1952), *enfd.* as modified 200 F.2d 375 (7th Cir. 1952). Although a no-solicitation rule is not involved in the instant case, we find the principles which underlie the broad proscription of union solicitation in a retail setting are equally applicable to conduct of this kind. Thus, in the circumstances of the present proceeding, we cannot, like the Administrative Law Judge, dismiss Kubota's misconduct—as he himself found it to be—as only a minor disturbance or distraction which, in balancing the competing interests involved, required Respondent to forgo taking any disciplinary action against her as its employee. Rather, we conclude that this uninvited invasion of Respondent's restaurant premises transgressed the boundaries by which concerted activity, even that which, as here, was nonviolent, and in protest of Respondent's unlawful conduct, is deemed protected by the Act.¹¹ Consequently, the demonstrators inside the restaurant did not enjoy the Act's protection.¹²

Moreover, Kubota's being an employee does not, under the circumstances, confer upon her any special status. The Administrative Law Judge considered it significant that Respondent had no rule pro-

rupted its operation by interfering with the ability of Respondent to serve its customers in a hospitable and peaceful setting.

¹⁰ See *Two Wheel Corp. d/b/a Honda of Mineola*, *supra*, cases cited at fn. 3.

¹¹ Although the dissent concedes that Respondent's restaurant is a retail establishment, it has concluded that the effect of the demonstration on the customers present at the time was negligible and that Board law in this area therefore is inapplicable. Apparently, our colleague would find that, while peaceful employee soliciting within a retail establishment lawfully can be prohibited because it is too disruptive of the customer-salesperson relationship, invasion of the premises of a restaurant by 30 noisy demonstrators during the dinner hour is not.

¹² We are puzzled by our colleague's reference to the fact that one of the demonstrators (not Kubota) took a photograph of the manager in her office during the period the demonstrators were in the restaurant or that advance publicity of the demonstration appeared in the local Japanese newspaper. Our findings and conclusions in no way are based on these events, as is evident from our description of the demonstration which omits mention of either of them, and we perceive no relevance in these events to the issue of Kubota's dismissal.

hibiting employees from entering public or private areas of the restaurant while they were not working. He also noted that employees entertained themselves in the office or a television room during their nonworking time. Contrary to the Administrative Law Judge, we attach no significance to these facts. That no rule existed against the individual use of the restaurant's facilities by an employee on his or her nonworking time has no relevance to a situation involving 30 demonstrators who, together, push their way into the restaurant without authorization to carry on their demonstration.

The situations are poles apart. The use of a restaurant by employees while not at work cannot be equated to, nor can be validly compared to, a mass demonstration. Consequently, Kubota's status as an alleged discriminatee is not enhanced by privileges allowed her as an employee. Thus, we find that Kubota, having participated in the demonstration in Respondent's restaurant, forfeited the protection of the Act. She was, therefore, subject to any discipline which Respondent chose to impose upon her. Accordingly, we shall dismiss the allegations of the complaint that Respondent violated the Act by discharging Kubota.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, G.T.A. Enterprises, Inc. d/b/a "Restaurant Horikawa," Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(c) and reletter the subsequent paragraphs accordingly.

2. Substitute the following for paragraphs 2(a) and (b):

"(a) Offer to Rosario Leyba immediate and full reinstatement to his former job or, if such job is no longer available, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges, discharging, if necessary, any replacement hired after the date of his unlawful discharge.

"(b) Make Rosario Leyba whole for any loss of earnings which he may have suffered by virtue of the discrimination against him by paying him an amount equal to what he would have earned from the date of his discharge to the date that he is offered reinstatement with appropriate interest, to be

computed in the manner set forth in the section of this Decision entitled 'Remedy.'"¹³

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

IT IS FURTHER ORDERED that the election held at Los Angeles, California, on July 20, 1979, in Case 21-RC-15974 be, and the same hereby is, set aside, and that Case 21-RC-15974 be, and the same hereby is, severed from Cases 21-CA-18082, 21-CA-18234, and 21-CA-18392 and remanded to the Regional Director for Region 21 for the purpose of conducting a new election.

[Direction of Second Election¹⁴ omitted from publication.]

MEMBER FANNING, dissenting in part:

Unlike my colleagues, I agree with the Administrative Law Judge that Kubota was discharged in violation of Section 8(a)(1) of the Act for participation in protected concerted activity that occurred October 27, 1979. This activity consisted of participation in a group demonstration, of short duration, inside the restaurant where Kubota was employed as a waitress. Kubota was not scheduled to work at this time. The Administrative Law Judge concluded that her participation "did not on balance justify terminating her employment" particularly as the demonstration involved the protest of Respondent's unfair labor practices which were well publicized by the leaflets and picket signs used in the earlier sidewalk picketing by the same group.

About 30 demonstrators entered the restaurant at approximately 5:30 p.m. Kubota was the only "current" employee among them. Sato and Ikuyo were former employees who participated. The picket signs and leaflets used outside referred to Sato's recent arrest by immigration officials, as well as to the discharge of former employee Leyba, to the employment conditions at the restaurant, and to the recent unsuccessful attempt of employees to achieve union representation by election.

My colleagues reverse the 8(a)(1) violation as to Kubota. They conclude that "Kubota and the other demonstrators lost the protection of the Act when they took their demonstration inside the restaurant."¹⁵ In reaching their conclusion my colleagues

¹³ In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980). Member Jenkins would award interest on the backpay due based on the formula set forth therein.

¹⁴ [Excelsior footnote omitted from publication.]

¹⁵ As the Administrative Law Judge found, the alleged violation concerns only Kubota. Her discharge occurred November 1, when she was presented with a letter discharging her for "participation in the mass demonstration on the restaurant premises during active business hours."

describe the demonstration within the restaurant in terms that I regard as exaggerated, saying that the group "jammed into the already crowded restaurant and pushed their way through [the restaurant and] out again in the same noisy manner." They say, also, that the dining room was "full or near capacity"—contrary to the thrust of the receptionist's testimony—and portray the participants as "parading boisterously about during the dinner hour when patronage was at or near its peak."¹⁶ In my view the record does not support the majority's description of what happened. Granted that "customers were exposed to the sights and sounds of the demonstrators," what occurred seems more accurately described as limited to chanting in Japanese while filing down the steps and through the corridor to Manager Taki's office, followed by a return to the street up the same stairs.¹⁷

Thus I would describe the group-crossings of the public areas of the restaurant as orderly, involving no intrusion into the various dining areas, lasting at most 15 minutes, and accompanied by no threat or calculated attempt to disrupt the restaurant's business. The photograph taken of the manager in her office was not taken by Kubota, and appears to have had no sinister connotation. It may have been a matter of news coverage inasmuch as a Japanese language newspaper had announced that a demonstration in front of the restaurant would occur. According to Kubota's testimony, the group mainly wanted to ask Manager Taki about the circumstances of Sato having been picked up by immigration officers a week before, a purpose explained by the demonstrators before they entered.

Employee misconduct incident to strikes is customarily assessed by the Board in terms of balancing such activity against the severity of the unfair labor practices that provoke the strike. In *Thayer*¹⁸ the court referred approvingly to that approach by the Board. I would also note that in some cases of industrial disturbance the Board has declined to find unprotected an employee work stoppage lasting several hours. See, for example, *Lee Cylinder Division of Golay & Co., Inc., et al.*, 156 NLRB 1252, 1262 (1966), where employees stopped work to protest an illegal discharge and loitered in the plant for 1-1/2 to 2 hours awaiting a decision. Here the demonstration occurred in a restaurant where a labor dispute had been in progress for some

months. Restaurants are considered a retail endeavor and in the context of ongoing organizing of retail store employees the Board has stated its purpose as being "to prevent undue interruption or disturbance of the customer-salesperson relationship and the consequent disruption of store business."¹⁹ Examining the demonstration here in that light, interruption and disruption were negligible. From the standpoint of inconvenience to diners the demonstration was virtually innocuous. The demonstration did not involve entering areas where patrons were in fact dining; it was directed at management; it was timed early in the dinner period thus calculated to minimize diner impact, if any; it lasted at most 15 minutes; it was orderly and involved no threats, and—importantly—the demonstrators left when they were asked to do so. To my mind the apparent continuation of Respondent's reprisals for union activity suggested by this record far outweigh the speculative impact of the brief demonstration in which Kubota participated.²⁰

I would order Kubota reinstated with appropriate backpay.

¹⁹ See *Marshall Field & Company*, 98 NLRB 88, 92 (1952), *enfd.* as modified 200 F.2d 375 (7th Cir. 1952).

²⁰ My colleagues quote the testimony of the receptionist who asked the demonstrators to leave, saying "we were real, real busy that night, and I did not want any problems." I suggest that their "reading" is too literal. It is evident on the record that the receptionist was *anticipating* a busy evening *later on*. This is established by the reservation sheet and the notations of arrival times thereon.

The discharge letter given to Kubota mentions "direct participation" in a mass demonstration. Kubota did participate in the demonstration to the extent of filing through the restaurant corridor with others to the manager's office. However, she did not lead the demonstration and did not take the picture of the manager, referred to in Respondent's discharge letter as "the illegal photographing of a company representative." The purpose of the demonstration was to talk with the manager in her office. To do this it was necessary to pass through the corridor but not the separate dining rooms. Kubota described herself as a "passive participant" in the demonstration, which on the record seems appropriate. The demonstration itself was brief and the impact on diners in the various dining rooms not shown to be other than minimal. That it "disturbed" the 13 persons waiting to be seated is speculative. To characterize the incident as "an invasion . . . by 30 noisy demonstrators" is in my view to aggrandize it. To compare its impact to the interruptions of business from a union organizing campaign of on-duty selling employees in a department store is to ignore reality. I have pointed out in this dissent that such activity in department stores is specifically banned by Board law, with which I have agreed. The single demonstration in this restaurant is variously described as lasting 5 to 15 minutes and the demonstrators as leaving when they were asked to leave. Customer impact based on this brief demonstration at the beginning of the evening dinner period as compared with the effect to be anticipated from an extended organizing campaign within store premises are poles apart.

¹⁶ Kubota had testified that business picks up in the restaurant after 5:30 p.m. and that the restaurant is busy from 6:30 to 8.

¹⁷ The restaurant's receptionist referred to 13 persons waiting to be seated. They had reached the restaurant by elevator. She described the restaurant facilities as consisting of a sushi bar, a dining room, a banquet room, and a teppan room. The latter has tables for eight persons; cooking for a table is begun when eight are seated.

¹⁸ *N.L.R.B. v. Thayer Company, and H. N. Thayer*, 213 F.2d 748 (1st Cir. 1954), *cert. denied* 348 U.S. 883.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a full hearing at which the parties had an opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice in the English, Japanese, Spanish, and Korean languages, and to carry out its terms.

The Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help a union
- To bargain collectively through a representative of your own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all of these things.

WE WILL NOT interrogate employees about their union activities, the union activities of other employees, or employees' opinions concerning Hotel and Restaurant Employees and Bartenders Union, Local 11, AFL-CIO.

WE WILL NOT interrogate employees about how they intend to vote in an election to determine whether or not the Union should represent them.

WE WILL NOT threaten employees that they might lose their jobs, might be unable to work, or might suffer reduction in benefits or other terms and conditions of employment, should the Union win a National Labor Relations Board election or otherwise be designated as the employees' representative.

WE WILL NOT grant additional unpaid time off in order to influence employees to vote against the Union.

WE WILL NOT threaten to have employees deported or threaten to get even with employees because of their activities or sympathies on behalf of the Union.

WE WILL NOT threaten physical harm or actually strike, grab, or push employees because of their activities or sympathies on behalf of the Union.

WE WILL NOT solicit employee grievances while creating the impression that such grievances will be remedied in order to discourage employee support for the Union.

WE WILL NOT promise increased benefits such as dental insurance in order to discourage employee support for the Union.

WE WILL NOT confiscate union literature or prohibit employees from taking union literature from union supporters on public property.

WE WILL NOT schedule employee meetings so as to prevent employee attendance at union meetings.

WE WILL NOT discharge employees because they ask questions concerning benefits if the Union were to represent employees or because employees act in concert with others to protest our unfair labor practices.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

WE WILL offer Rosario Leyba immediate and full reinstatement to his former job or, if such job is no longer available, to a substantially equivalent position without prejudice to his seniority or any other rights and privileges, discharging, if necessary, any replacement hired after the date of his unlawful discharge.

WE WILL make Rosario Leyba whole for any loss of earnings which he may have suffered by virtue of the discrimination against him by paying him an amount equal to what he would have earned from the date of his discharge to the date that he is offered reinstatement with appropriate interest.

G.T.A. ENTERPRISES, INC. D/B/A
"RESTAURANT HORIKAWA"

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This case was heard before me at Los Angeles, California, on February 4-8, 12-15, 20, and 21, 1980, pursuant to a second amended order consolidating cases, amended consolidated complaint and amended notice of hearing issued on December 28, 1979, by the Regional Director for the National Labor Relations Board for Region 21. Said second amended order had been preceded by the issuance by the Regional Director of a complaint and notice of hearing on September 21, 1979, a report on objections and order directing hearing and order consolidating cases and notice of hearing on September 28, 1979, and an amended order consolidating cases, and consolidated amended complaint and amended notice of hearing on November 16, 1979. These pleadings were predicated upon charges and a petition filed by Hotel

and Restaurant Employees and Bartenders Union, Local 11, AFL-CIO (herein the Union), against G.T.A. Enterprises, Inc. d/b/a "Restaurant Horikawa" (herein called Respondent or the Employer) as follows: Case 21-CA-18082 on August 10, 1979, Case 21-CA-18234 on September 28, 1979, Case 21-CA-18392 on November 13, 1979, and Case 21-RC-15974 on May 29, 1979.

The amended consolidated complaint alleges that Respondent committed certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, herein called the Act.

The Union filed timely objections to the conduct of Respondent as it affected the Board election held on July 20, 1979. These objections in part parallel the unfair labor practices of the amended consolidated complaint and in part allege other conduct which it contends require the election results be set aside.

Upon the entire record of the case,¹ from my observation of the witnesses and their demeanor,² as well as the briefs of the parties,³ I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent has been at all times material a California corporation operating a restaurant in Los Angeles, California. Respondent annually derives revenue in excess of \$500,000 from its restaurant and purchases goods and products valued in excess of \$25,000 from suppliers located in the State of California who in turn have purchased and received said goods directly from suppliers located outside the State.

The amended consolidated complaint alleges, the amended answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The amended consolidated complaint alleges, the amended answer admits, and I find that, at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The General Counsel has alleged a variety of violations of Section 8(a)(1) and (3) of the Act and seeks a bargaining order remedy with a concomitant finding of a

violation of Section 8(a)(5) of the Act. Respondent denies the conduct attributed to it and, in the majority of allegations, denies responsibility for the individuals the General Counsel contends are agents of Respondent. The various agency and unfair labor practice issues in the case lend themselves to an item-by-item presentation.

A. The Agency Allegations

1. Background

Respondent operates a restaurant situated in the basement of the Kajima Building which is located at 111 South San Pedro Street, Los Angeles, California (herein the restaurant). The restaurant offers Japanese cuisine served in a traditional manner. Luncheon and dinner service of food and beverages are offered.

The restaurant employs approximately over 60 employees. It is divided into public areas of general reception, dining room, bar, teppan, and sushi, and into private or employee areas of kitchen, service, and administration. The parties in the representation case, with the approval of the Regional Director, stipulated to an election in the following unit at the restaurant:

All kitchen, dining room and bar employees; excluding office clerical employees, watchmen, guards and supervisors as defined in the Act.

The parties also stipulated, as part of the election agreement:

In connection with Case 21-RC-15974 the parties hereto agree that all chefs are not supervisors within the meaning of the Act and are entitled to vote.

The amended consolidated complaint alleges the following individuals as supervisors and agents of Respondent:⁴ Yasuo Horikawa, Natsuko Taki, Masao Takemoto, Takashi Iwabuchi, Jiro Robinson, and Kazuko Harrell. These individual will be discussed *seriatim*:

2. Yasuo Horikawa

Horikawa is the president, principal, and admitted agent of Respondent. He has substantial restaurant interests in Japan and spends approximately half his time in that country. He also has interests in a second restaurant in California not involved in this proceeding. While an admitted agent, Horikawa is not involved on a full-time basis in the management of the restaurant. I find he is a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent.

3. Natsuko Taki

Taki is the manager and admitted agent and supervisor at the restaurant. Respondent contends that, save for Horikawa, Taki is the sole supervisor at the restaurant. She is active in the day-to-day management of the facility and is its principal managing agent. I find she is a su-

¹ Subsequent to the conclusion of the hearing in the case, the General Counsel sought permission to submit additional documentary evidence. Following receipt of the positions of the parties, I allowed both the General Counsel and Respondent to submit certain documentary evidence. The English language portion only of all bilingual Spanish-English or Japanese-English exhibit was relied on. Regrettably, the spelling of the names of certain individuals varied in the record.

² The bulk of testimony received was through Spanish-English and Japanese-English language interpretation.

³ The parties filed timely post-hearing briefs. Respondent subsequently filed a motion for permission to file a reply brief to the General Counsel's brief assertedly for the purposes of correcting certain factual inaccuracies and misrepresentations. I denied the motion. I have relied on the briefs solely as the positions and arguments of the parties. Assertions or representations not supported by the record or the legal authorities cited have been disregarded.

⁴ Other individuals who the General Counsel contends are supervisors for purposes of unit placement only are discussed *infra*.

pervisor within the meaning of Section 2(11) of the Act and an agent of Respondent.

4. Masao Takemoto

Takemoto, the office manager, directs the work of the office staff and is involved in the administrative aspects of the restaurant's operation. Takemoto is salaried, as are all the office staff, although his salary level is substantially higher than all employees save the manager. Also, he receives significantly higher annual bonuses and employer-paid life insurance than other employees.

Takemoto is involved in hiring employees for his section. He interviews prospective applicants alone or with Taki. He makes recommendations with respect to hire, although Taki testified she makes all hiring decisions. Like other section heads, Takemoto can administer at least low-level discipline without approval and is involved in training employees in his section.

Takemoto regularly attends weekly section meetings attended by all section heads and certain other employees where business issues and plans are discussed and problems aired. He also on at least several occasions participated with Taki in meetings where employees received pro-restaurant preelection campaign addresses. Takemoto requested a meeting with and met individually with employee Satoshi Sato. At that meeting he discussed the upcoming representation election, company benefits, and the consequences of unionization. Takemoto distributed company antiunion literature at this meeting and informed Sato he had been researching union issues for management. Takemoto also told Sato that he would be paid overtime for the period of time they met together, and he was so paid.

Takemoto did not testify at the hearing nor was his absence explained on the record. As discussed in greater detail, *infra*, I am unable to accept the statements of Taki that all supervisory authority at the restaurant resides solely in her. Takemoto was clearly a trusted comrade who worked closely with Taki. He was highly paid in comparison to others and was active in the election campaign on behalf of management. His role in the decision-making structure, both as to staff meetings and hiring, was active and substantial at least with respect to his section.

On the basis of all the above, I find that Takemoto was a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent. Even were he not to have had any of the actual authority the indicia of which are enumerated in Section 2(11) of the Act, it is clear that Respondent has cloaked Takemoto with sufficient apparent authority in these areas to have been reasonably regarded by employees as an agent of management for purposes of the unfair labor practice allegations herein.

5. Takashi Iwabuchi⁵

Iwabuchi is the assistant manager and the acting chief of the teppan section. He is salaried and receives a sig-

nificantly greater salary and annual bonus than any employee save for the office manager and the manager. He receives the same employer-paid life insurance coverage that the office manager and the head chef receive which is much higher than other employees.

Iwabuchi is in charge of the busing employees and prepares their work schedule on a regular basis. He reprimands them and, in at least several instances, has threatened inadequate workers with termination should they fail to improve. Former employee Lucy Kubota testified that she had requested a day off from the assistant manager and he granted her request without obtaining the approval of the manager. Iwabuchi is the primary recorder of the business transacted at the section head meetings and maintains a desk and file cabinet in the office for his records.

Iwabuchi did not testify at the hearing nor was his absence explained by Respondent. Several employees testified to the active, indeed, the controlling role Iwabuchi played in their interview and hiring process. While Taki testified that no employee was hired at the restaurant without her interviewing and approving their hire, I credit the testimony of employees Leyba, Ortiz, Gutierrez, and Kubota that Iwabuchi played an active role in their interviewing and hiring process and, in the case of Ortiz, find that he was hired without meeting Taki. Iwabuchi clearly made written comments on the application papers and expressed his recommendations concerning hire to Taki. I find his recommendations with respect to hire, at least in the instances stated, were effective.

Iwabuchi conducted employee meetings where attendance was required and company rules concerning employee conduct were discussed. While Taki suggested she would have Iwabuchi start employee meetings or start employee applicant interviews expecting to arrive herself a few minutes later, I cannot credit her testimony in this regard. I find that Iwabuchi had occasion to hold such meetings on his own. Taki seemed to me to have a firm determination not to admit, either generally or in specific example, that she was not the sole supervisor at the facility. This determination, coupled with the danger of distortion in the translation process, produced testimony which could not be relied on where it sought to deny examples of the supervisory status of other employees of Respondent.

Like Takemoto, and perhaps even more actively, Iwabuchi was involved in the campaign against the Union on behalf of Respondent. As discussed in detail *infra*, he met with Latino employees and distributed a sample ballot in an antiunion context. He spoke forcefully on behalf of management at employee meetings and in individual conversations with employees and regularly acted for management in opposing the Union.

I have found that the assistant manager at least occasionally hired employees on his own. I have also found that he directed, scheduled, reprimanded, and instructed employees. There is no doubt that he is a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent.⁶

⁵ Iwabuchi's name was on the election list of names and addresses prepared by Respondent and submitted to the Union. His vote was challenged by the Union. The challenge was never resolved.

⁶ Taki's testimony to the contrary is discredited where inconsistent with the testimony of others.

6. Jiro Robinson⁷

Jiro Robinson is the chief bartender. He has two bartenders, two cocktail waitresses, and a cashier under his direction. He schedules these employees and is in charge of his section. Robinson has authority to administer light discipline and may send employees home when the manager is absent. He undertakes initial applicant interviews and reports to the manager concerning his evaluation of the applicant.

Robinson also occasionally acts as the night manager who is responsible for locking up at the close of business and for general security and safety. Robinson is also responsible for ordering section supplies and maintaining inventory records. He has a desk in the office and keeps records there on a regular basis.

Robinson is salaried and receives an annual income lower than the office manager and assistant manager but significantly higher than all other employees. His annual bonus and insurance coverage is of similar relative magnitude. The bartenders and cocktail waitresses in his section are hourly paid and receive lower wage and fringe benefits. Robinson did not testify nor was his absence explained by Respondent. Again, I am unable to credit fully the testimony of Taki regarding the limited powers granted her section heads, including Robinson's, with respect to supervisory functions. I find that he responsibly directs his employees. Robinson spends time at his office desk or elsewhere preparing employee schedules or keeping inventory records current. The record seems clear to me that Respondent, at the very least, held out Robinson, among others, as a section head with actual or apparent authority to supervise employees, to participate in training, and, in some cases, to interview prospective employees. I find Robinson, for the reasons stated, to be a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent.

7. Kazuko Harrell⁸

Harrell is the head waitress in the dining room. She has between four and eight employees under her direction and makes out the weekly schedules for these employees. She has been involved in initial job interviews within her section and regularly passes out initial application papers. She is involved in training and familiarizing new employees with their duties in the section. Employee witness Kazuko Murakami referred to Harrell as her supervisor in her testimony. Harrell is hourly paid and the record is not clear what relative salary difference exists, if any, between her and other waitresses. Her bonus, while less than the others described above, is more than double that of waiters and waitresses and her insurance fringe coverage is in a higher category than regular employees.

Harrell administers light discipline and corrective suggestions to the employees in her section. Employee Ortiz

was instructed by the assistant manager to listen to the instructions of Harrell. Harrell, along with other section heads, is responsible for bringing employee difficulties to the manager's attention for resolution. She regularly performs job-related duties in the office between 3 and 5 p.m., a period when regular waiters and waitresses are not working. Harrell, along with Robinson, had occasion to confront individuals handbilling at the restaurant and suggested they were not properly on or near the premises. Further, she, as will be discussed *infra*, issued orders to and recovered handbills from employees as they attempted to enter the premises.

While the issue is closer with respect to Harrell than the other individuals discussed above, I am convinced that Harrell is a supervisor within the meaning of the Act and an agent of Respondent. First, as with other section heads, she had actual or apparent authority deriving from her regular role in directing the employees in her section, scheduling those employees, being involved in the applicant interview process, and in acting in a disciplining or correcting manner with respect to employees in her section. The record reflects that employees perceived section heads as having supervisory authority over the employees in their section.

I have considered the arguments of Respondent that Harrell was merely most senior among the waitresses and that she as but one among others made corrective suggestions and trained employees. This argument is parallel to the argument that, at section meetings and in directing employees generally, section heads made suggestions or reported difficulties with no effective recommendation ever being made.

It would appear that the decisionmaking process at the restaurant, as well as its supervisory structure, follows a pattern somewhat unlike the more common hierarchical authority and superior-subordinate decisionmaking process that occurs in most enterprises. Respondent's decision process seems to be heavily weighted toward consultation and establishing a management consensus with few concrete recommendations made to superiors. This also seems to apply to personnel matters. Accepting the existence of this less than direct decisionmaking process, I nevertheless find that the section heads discussed, *supra*, including Harrell, have the actual or apparent authority to act in a supervisory capacity within their section. Respondent, even in the indirect way described, has held out its section heads to employees as having disciplinary authority and scheduling authority. They have established roles in interviewing and training employees and act as information and grievance conduits to the manager. Section heads meet with the manager when employees problems occur. They discuss and recommend wage increases and disciplinary action with the manager. In the manager's absence her authority devolves essentially to the individual section heads for her own section. Based on all the above, despite the minimizing testimony of Taki which I have discussed earlier, I find the section heads, including Harrell, are supervisors within the meaning of the Act and are agents acting for Respondent.

⁷ Robinson's name was on the election list of names and addresses prepared by Respondent and submitted to the Union. His vote was challenged by the Union. The challenge was never resolved.

⁸ Harrell's name was on the election list of names and addresses prepared by Respondent and submitted to the Union. Her vote was challenged by the Union. The challenge was never resolved.

B. *The Allegations of Independent 8(a)(1) Violations*⁹

1. Preliminary comments

Respondent, without explanation, chose to contest the allegations in the complaint primarily through collateral witnesses rather than the agents alleged to have violated the Act. With the exception of Taki, no agent of Respondent testified to deny the conduct attributed to him or her. Nor did Taki address all the statements attributed to her. Largely, therefore, what follows is a recitation of the testimony of the General Counsel's witnesses concerning a wide variety of alleged conduct. In light of these facts the allegations will be discussed chronologically, *seriatim*.

2. Conduct alleged as occurring prior to the filing of the petition

May 19 and 21, 1979, Alleged Interrogation Concerning Union Activities. Creation of the Impression It Would Be Futile To Support the Union, Solicitation of Grievances Implying They Would Be Remedied, and Threat To Have Employees Deported—Natsuko Taki

Former employee Tomio Sakuma testified to a meeting with Taki in room a-6 of the restaurant in the very early morning of May 19, 1979. He testified that Taki told him "I know that Teru¹⁰ and you are gathering the signature [sic] for the union authorization cards." After Sakuma did not directly reply, Taki continued: "When did you start this? Who started this? Who signed the cards? and why are you doing this?" Following further discussion, Sakuma recalled Taki asking: "Specifically, what are your grievances? State them." A discussion of Sakuma's perceived grievances then occurred with Taki demurring, debating, and advancing answers to the grievances. Sakuma mentioned that employees had previously discussed grievances among themselves and that an earlier petition or list was extant but that rather than bring the list to management the employees had determined to organize a union. Taki asked to see the list. During the conversation, Sakuma recalled Taki say she would raise the grievances with Horikawa but that he would not accept a union.

On May 21, 1979, Taki and Sakuma resumed their conversation when Sakuma presented Taki with the list that employees prepared but later determined not to submit to management. Sakuma recalled that Taki asked about the origin of the document and reasserted that Horikawa would find a union unacceptable. Taki said that, were a union to come in, employees on student visas would have to quit.

Taki did not testify in detail concerning the substance of these conversations. She did not deny their occurrence. She did, however, deny knowledge of employee union activity previous to the conversations. By closely questioning the internal consistency of Sakuma's testimony

and by urging the credibility of Taki's testimony, Respondent seeks to contest the allegations.

I credit the testimony of Sakuma, including that set forth above, as the accurate recollection of a witness who was attempting to answer truthfully the questions put to him. I base this in part on the superior demeanor of Sakuma. Further, however, I find the denials of Taki insufficient to challenge the detailed testimony of Sakuma as to what each said and did. Respondent's critical examination of Sakuma's testimony must be considered in the context of the inherent problems which occur during translation of testimony. Given that circumstance I am unable to conclude that Sakuma's testimony was inconsistent or self-impeaching. Rather, as noted above I found it trustworthy and reliable. To the extent Taki's testimony is inconsistent with that of Sakuma, it is discredited.

Given the factual resolution, it follows that Taki's interrogations concerning union activities violate Section 8(a)(1) of the Act. So, too, Taki's solicitation of employee grievances in a union organization setting, coupled with her responses to those grievances, also violates Section 8(a)(1) of the Act.

Taki's prediction that Horikawa would not accept "unionization" is clearly a statement that Respondent's principal agent, and therefore Respondent, would not accept a union. As the General Counsel alleges the import of such a statement from the day-to-day manager of the facility is that it would be futile for employees to continue to seek representation by a union. The creation of such an impression of futility chills employee free choice in the exercise of their Section 7 rights and therefore violates Section 8(a)(1) of the Act.

The General Counsel argues that Taki's statement that students on visas could not remain employed at the restaurant if it were organized by a union is a threat to deport employees. I cannot accept the logical leap required to sustain the General Counsel's position. No statements regarding deportation are inferable. It is clear, however, that Taki was threatening adverse consequences to student employees on visas; i.e., the loss of employment if a union organized the facility. Indeed, Sakuma was such a student employee. Inasmuch as the matter was fully litigated and the threat which occurred is similar to that alleged by the General Counsel, I shall find a violation of Section 8(a)(1) of the Act by Respondent's threat of job loss, rather than by threat to deport were the Union to represent employees.

3. Conduct alleged as occurring after the filing of the petition and before the election

a. *June 16, 1979, alleged solicitation of grievances implying they would be remedied, threat of reprisals, and physical assault—Takashi Iwabuchi*

Sakuma testified to an early morning conversation alone with Assistant Manager Iwabuchi at the restaurant in Room A-6 on June 16, 1979. Iwabuchi did not testify at the hearing. I credit Sakuma's version of what occurred. Without setting forth the details beyond those necessary to resolve the allegations in the complaint,

⁹ Allegations associated with reduction in hours or discharge of employees will be treated in a separate section, *infra*.

¹⁰ Teru is the Japanese name for former employee Lucy Kubota.

Iwabuchi expressed disfavor with Sakuma's union activities and asked Sakuma the basis for his interest in the Union. When Sakuma suggested he sought better working conditions, Iwabuchi replied: "Specifically, what are your grievances?" Further conversation included Iwabuchi complaining about Sakuma's solicitation of employee support for the Union.

Iwabuchi encouraged Sakuma to quit his employment and noted: "If you are planning to work any more or further, I am going to put you in a very miserable situation." Sakuma indicated he intended to continue working. Finally, when Sakuma expressed a desire and intention to leave the room, Iwabuchi struck him once and then a second time forcing Sakuma heavily against the wall. After so doing Iwabuchi stood mute with a very frightening look.¹¹ After a few minutes, Sakuma was allowed to leave but, as he did so, Iwabuchi said he would "get even" with Sakuma and other named waiters in the teppan section.

Based on the above credited testimony, I find that Respondent violated Section 8(a)(1) of the Act by interrogating Sakuma about his union activities, by threatening to retaliate against him because of his union activity, and by committing assault and battery upon him. I do not find Iwabuchi's solicitations regarding Sakuma's grievances independently to violate the Act for they were devoid of any context or implication which created the impression that the interrogation was for purposes of satisfying the grievances. Rather, I find them part of the general wrongful interrogation of Sakuma concerning his union activities and his interest in the Union.

*b. June 22 and 29, 1979, alleged interrogation concerning union activities and creation of the impression that union representation would be futile—
Natsuko Taki*

Former employee Daniel Gutierrez testified to two meetings of nine Latino employees and the manager occurring 3 and 4 weeks before the July 20, 1979, election, respectively. He testified that the office manager, Takemoto, attended the first but not the second meeting. No other participant testified concerning the meetings.

Gutierrez testified that he translated from English to Spanish at the meetings for Taki. At each meeting she asked if employees had signed union authorization cards. One employee admitted to signing such a card but denied he was "against" the restaurant. At the second meeting Gutierrez recalled that, in a discussion of the reasons for not supporting the Union, Taki noted that employees would receive no benefits from the Union because Respondent would not sign a contract with the Union and that therefore the employees would have to strike.

Respondent attacks Gutierrez' version of these meetings by describing inconsistencies in Gutierrez' testimony and by noting the lack of corroboration by other witnesses. Despite the less than mechanical consistency, I

¹¹ Over the objection of Respondent's counsel, I received, and credit, testimony from Japanese witness Murakami who had many years' experience living in Japan, that the Yakuza, or fearsome look, is a hostile gesture in the Japanese culture with a more frightening aspect in its silence than shouting belligerence.

credit Gutierrez' testimony concerning the above-described events. First, he seemed to me to be an honest witness trying to testify to what he said and heard. As a translator at the meeting, it could be expected that he would well recall what was said inasmuch as he was required to repeat the comments made in translating them into Spanish. Further, he testified to events in detail. I do not believe that Gutierrez would either misrecall or imagine two meetings in such detail. As to the lack of corroboration, Respondent, too, chose not to contest the meetings through Taki who testified at length at the hearing. Takemoto did not testify. Other witnesses were presumably equally available to all parties.¹²

Having credited Gutierrez' version of events, it follows that I find Ms. Taki, by engaging in the conduct described above, violated Section 8(a)(1) by interrogating employees about their union activity and by creating the impression among employees that union representation would be a futility.

c. June 25 and 29, 1979, threats of reprisals—Masao Takemoto

Satoshi Sato, a former employee of Respondent, testified to a conversation in the restaurant kitchen on June 25, 1979. At approximately 3 o'clock in the afternoon, Sato, Kuniko, an employee from the dining room, and Nobuko, an employee from the teppan section, had just completed their meal and were conversing at a table. Takemoto came in and seated himself at the table with the others. Sato testified that Takemoto said that he had been extremely busy in the past month but that he had learned a lot and that it had been a lesson. He continued: "[I]nstead of coming directly to us they applied the pressure of having gone to the outside organization . . . I probably will quit if the company were to join the union or become unionized . . . I have two ways of getting even." These remarks were interpreted by Sato as a threat to contact the U.S. Immigration and Naturalization Service and have employees deported. None of the other participants in the conversation testified at the hearing.

Respondent attacks the testimony of Sato concerning this conversation primarily by arguing that he merely overheard the conversation of two others sharing a meal. Thus, argues Respondent, the conversation was "not intended for his ears." I reject the contention of Respondent here. Sato's uncontradicted testimony indicates that Takemoto was the individual who joined the other three. Further, the close proximity of the participants makes it clear that all were the intended recipients of Takemoto's remarks irrespective of the particular individual Takemoto was facing when he spoke. I therefore find that Takemoto's remark concerning "getting even" was intended for Sato's hearing and was clearly connected to Takemoto's animosity toward those who supported the Union.

I am unable to find that Takemoto's remarks can be held to be a threat to contact the U.S. Immigration and

¹² German Perez, for example, an employee who was alleged to have told Taki in these meetings that he signed a union authorization card, was still employed by Respondent at the conclusion of the hearing.

Naturalization Service, for the testimony of Sato gives no objective basis for that conclusion. Sato himself was subsequently apprehended by the U.S. Immigration and Naturalization Service. The subjective impressions formed by a listener standing alone cannot give broader significance to a statement without objective evidence of hidden or coded meaning not present here. It is sufficient, however, that Takemoto made the general threat that he had means of "getting even." Such a threat violates Section 8(a)(1) of the Act.

Sato testified to a late evening conversation with Takemoto on June 29, 1979, alone in room A-6. Sato was told by Takemoto during this conversation that he would be paid for the time spent in the meeting and was later so paid. During the lengthy conversation about the adverse consequences of unionization, Sato recalled Takemoto suggesting, *inter alia*, that an employee would not be able to obtain benefits if the union representative did not like the particular employee, that since the Company would not accept unionization a strike would occur, and that during a strike if employees sought to work elsewhere they would be blacklisted by the Union. Takemoto did not testify.

Respondent notes that a document was used by Takemoto as a basis for the conversation. Presumably the propriety of the document is offered by Respondent to suggest that the conversation closely followed the document and that Sato's recollections of statements different from those contained in the document are not to be believed. Respondent also argues that Sato described his conversation with Takemoto to others in a "joking manner" and that Sato admitted that he doubted the veracity of Takemoto's representations. Thus, Respondent concludes the statements of Takemoto were without coercive effect.

I credit Sato's unchallenged testimony regarding Takemoto's statements. It is true that a document was discussed during the conversation and that the document was not coextensive with what Sato recalled Takemoto said in the conversation. I do not find these facts to be any impediment to my crediting Sato or of the likelihood that Takemoto went beyond the document in his statements to Sato. I so find. Further, I do not find that Sato indicated to his colleagues that his conversation with Takemoto had no effect upon him. He testified that he joked about it. This is not inconsistent with being influenced by the remarks. Even were I so to find, the technique to be applied in judging an alleged violation of Section 8(a)(1) of the Act is an objective evaluation of the normal effect of the words used rather than a subjective examination of the personal impact on the particular witness. Here, examining what Takemoto said, I find that Takemoto clearly threatened employees with adverse economic consequences should the Union organize Respondent. In so doing Respondent violated Section 8(a)(1) of the Act.

d. June 30 and July 1979 threats to close facility, deport employees, take reprisals in order to discourage employee support for the Union—Jiro Robinson

Former employee Tomio Sakuma testified to a conversation with Jiro Robinson on June 30, 1979. Among other things during the conversation concerning the

Union, Sakuma recalled Robinson told him: (1) that if the facility were unionized Horikawa would either close or sell the restaurant thus causing difficulty for Robinson, and (2) that Robinson would report Sakuma to "immigration" and have him deported if he did not abandon his activity in support of the union. Robinson did not testify.

Employee Kazuko Murakami testified through a Japanese-English interpreter that Jiro Robinson in early July told her "don't do anything that you might cry about later." He also asked her, at an unspecified date, if she had attended a picnic. The witness indicated that Robinson's reference was to picnics held by the Union. These comments were not placed in a broader context by the General Counsel.

There is no real challenge to Sakuma's testimony which I fully credit. I find Robinson's threat to deport Sakuma and his threat that the facility would be closed or sold should the Union prevail each violate Section 8(a)(1) of the Act.

I do not sustain the General Counsel's allegations with respect to July threats to Murakami. Murakami's credibility is not in issue here. I find that Robinson made the remarks attributed to him. These comments, however, are simply too isolated, out of context, vague, and ambiguous to support a finding of a violation of the Act. No objective evidence was introduced to link up convincingly either the "cry later" or the "picnic" questioning to the Union. The General Counsel has failed to meet his burden of proof on this issue. Accordingly, I shall dismiss this aspect of the complaint.

e. July 2 and 10, 1979, creation of impression that it was futile to support the Union—Natsuko Taki

Murakami credibly testified to a meeting with Taki held at Taki's request on the evening of July 2, 1979. In a long and sometimes emotional meeting, Taki suggested that, if the facility were to be organized, (1) there would be a strike because Horikawa did not want the Union, (2) employee gratuities would be reported more strictly with a resulting reduction in Murakami's wage from \$2.90 to \$2.35 per hour, and (3) in the event of a strike, the Union would blacklist those employees who refused to strike.

Taki did not deny the statements attributed to her. Respondent does not attack Murakami's testimony but argues that the conversation was one based on confidence and friendship and therefore Taki's remarks were advisory only and innocent of threat. I reject such a defense and find that the statements described above, which I credit, violate Section 8(a)(1) of the Act as threats of economic reprisal and statements creating the impression that selecting the union would be a futility.¹³ Friendly advice, were I to find it as such which I do not, is not insulated from the application of the law.

¹³ I am unaware of any factual support in the record for the July 10, 1979, allegation in the complaint. It is not addressed in the General Counsel's brief. I assume the allegation is withdrawn, but would recommend its dismissal in any event for lack of evidence.

f. July 5, 1979, interrogation; July 19, 1979, solicitation of grievances implying such grievances would be remedied and promise of benefit to employees—Yasuo Horikawa

Former employee Daniel Gutierrez testified that he was asked to go to room A-6 on July 5, 1979, at or about 3 p.m. by the manager. He arrived and met with Horikawa, the manager, the sushi chef, the kitchen chef, the head waitress, the head bartender, and the teppan chef. He testified that he was the only employee present. Horikawa asked him to predict who among the Latino employees was going to vote against the Union. After Gutierrez had answered, Horikawa asked that Gutierrez help to insure that the employees vote against the Union. Horikawa showed Gutierrez a sample ballot with which he demonstrated how a vote was to be marked.

Former employee Hiroshi Suemura testified that he spoke with Horikawa at Horikawa's request on July 19, 1979. Suemura credibly testified that, among other matters, Horikawa asked Suemura what was the cause of the union problem. As Suemura suggested certain problems Horikawa proposed solutions. When dental insurance was discussed, Horikawa informed Suemura that dental insurance would be given to all employees effective immediately.¹⁴

None of the other participants in the July 5, 1979, conversation testified save Taki. She did not address this meeting in her testimony. Horikawa did not testify. Thus, the events of July 5 and 19, 1979, recited above are essentially unchallenged. I fully credit the testimony. The July 5, 1979, interrogation clearly violates Section 8(a)(1) of the Act. Horikawa's solicitation of grievances with the implication he would remedy them as well as his promise of dental insurance, in the context of the union campaign, each violate Section 8(a)(1) of the Act.

g. July 18, 1979, promise of benefits to employees—Masao Takemoto

Suemura testified that Takemoto asked him to join him for drinks on the evening of July 17 or 18, 1979. He did so. During their conversation Takemoto discussed changes that would occur at the restaurant if the Union won the election. The conversation then turned to Suemura's wage rate. Suemura had previously requested of Naito, the teppan chef, a wage increase but had been told, "because of the matter concerning the union, it was not possible, but it was—had not been forgotten." Takemoto told Suemura that he had not forgotten about the wage but because of the union matter his wage would not be "improved at that time." He stated, however, that the wage would be improved after the election when the result was learned. Takemoto did not testify at the hearing. I found Suemura to be a particularly credible witness—a view which Respondent on brief shared. I find therefore that the conversation occurred as testified to by Suemura.

Viewed in isolation, the remarks of Takemoto present a close question as to whether they independently violate Section 8(a)(1) of the Act as a promise of benefit. I

cannot view the remarks in isolation, however, but must consider them with the comments of Horikawa to Suemura occurring hard after this conversation and which contained illegal promises of benefit and solicitation of grievances as found, *supra*. I also must consider the approximately 2 hours of conversation preceding the wage comment in which Takemoto discussed the adverse consequences of unionization. In this context I have no difficulty finding Takemoto's statements to be part of a course of conduct by Respondent designed to create the impression that unionization was adverse to Suemura's interests. I find the remarks to be a conditional promise. After the result of the vote was learned, if the Union lost, his wage increase would be forthcoming. If the Union won, it would not. The whole thrust of Respondent's remarks to Suemura, through Takemoto and Horikawa, was to associate adverse consequences with unionization and immediate benefit if the Union were defeated. By this conduct Respondent has made both a promise of benefit and a threat that the increase could be lost. Respondent's promise and threat were designed to influence Suemura's vote in the upcoming election and therefore violated Section 8(a)(1) of the Act.

h. July 17 and 19, 1979, granting of benefits to employees to interfere with attendance at union meetings; interrogation of employees concerning their vote in the union election—Takashi Iwabuchi

The Union had scheduled employee meetings for July 17 and 19, 1979, and had mailed notification of these meetings to employees within a day or two of July 11. Gutierrez and Rosario Leyba¹⁵ each testified that on momentary notice Iwabuchi announced a meeting, gathered the Latino employees, and took them to lunch on both July 17 and 19. In each case the lunch coincided with the previously scheduled union employee meetings. Uncontradicted testimony indicates that the Latino employees would have gone to the union meetings but for the last-minute invitations by Iwabuchi.

Iwabuchi paid for the meals served at these luncheons. The uncontradicted testimony was that such luncheons had not occurred in the past although Iwabuchi asserted at the first lunch that its purpose was to commemorate an employee's leaving the restaurant. At the second of these meetings, Gutierrez testified that Iwabuchi did not say anything. Former employee Rosario Leyba testified that at the second meeting Iwabuchi passed around a sample ballot and asked employees how they were going to vote in the election. As noted previously, Iwabuchi did not testify nor did others concerning these meetings.

I find that the two meetings were scheduled and held by Iwabuchi to coincide with the Union's meetings as a pretext to prevent or retard the Union's communication with employees. Such a meeting with its attendant benefits has been held to violate Section 8(a)(1) of the Act. *Garry Manufacturing Company*, 242 NLRB 539 (1979).

Respondent suggests that I follow the reasoning of the administrative law judge in *Hanover Concrete Co.*, 241

¹⁴ Upon later inquiry, Suemura was informed that the promise had been a mistake. No dental insurance was forthcoming.

¹⁵ Leyba is also known as Miguel Aguirre. He will be referred to throughout the decision as Rosario Leyba.

NLRB 936 (1979), who, with Board approval, dismissed a similar allegation as merely curious. He found insufficient evidence to justify an inference of employer knowledge of the union meeting in the face of an employer denial and the lack of evidence of deliberate interference with the meeting. I am not persuaded by Respondent's arguments here. First, unlike *Hanover*, there was wide and early dissemination of the Union's announcement of its meetings. Second, the meetings held by Iwabuchi were precipitous, unusual, and not well justified. Third and most importantly, Iwabuchi did not testify to deny knowledge of the union meetings or to deny that his meetings were deliberately held to interfere with the Union. Respondent's general averments are not evidence of Iwabuchi's innocence here. Accordingly, I draw the inference that Iwabuchi learned of the previously scheduled union meetings and find that he scheduled his own luncheons to interdict the union meetings. It follows, therefore, that Respondent by so doing violated Section 8(a)(1) of the Act.

Respondent seeks a finding, consistent with the testimony of Gutierrez, that Iwabuchi said nothing at the second meeting. He argues that when Leyba testified to the contrary he was "simply lying." Such a finding would be necessary to discredit Leyba for his testimony concerning the second meeting went into some detail concerning the actions of Iwabuchi in physically circulating a ballot and in asking employees their intentions concerning the vote to be held the following day. Iwabuchi, as noted, did not testify.

I credit Leyba over Gutierrez as to what transpired at the second luncheon. While each was an honest witness, Leyba's testimony was detailed and unlikely to be a fabrication. Further, I am convinced that Gutierrez' answer, that Iwabuchi spoke not at all, was very unlikely considering my previous findings concerning the timing and motive of the employee meeting as well as the imminence of the election and Iwabuchi's strong antiunion bias, discussed *supra*, Gutierrez was simply mistaken.

Given this factual resolution, I find that the General Counsel has met his burden of proof in showing that Respondent, through Iwabuchi, interrogated employees about their voting intentions and thereby violated Section 8(a)(1) of the Act.

i. The July 19, 1979, handbilling incident

On July 19, 1979, employees as they approached the Kojima building were handed prounion leaflets by volunteer handbillers supporting the Union. The handbillers had earlier been inside the building, but had been asked to leave the premises and had complied. Handbiller Ginoza testified that on at least one occasion he observed Kazuko Harrell speak to an employee who had been given a leaflet and then take the leaflet from him. Ginoza also testified that Iwabuchi came outside and "just stood there . . . I believe he was scouting for workers. That is what I presume he was doing."

The other handbiller, Dennis Kobata, testified that he saw Harrell on two occasions "rip" leaflets from employees' hands as they tried to enter the building. He also heard Harrell speak to certain individuals in Japanese—which he could not understand—as they approached

Ginoza whereupon these individuals did not take leaflets from him. Kobata testified that Harrell told other employees in English, "Don't take it," whereupon these individuals also declined to take a proffered leaflet. Former employee Daniel Gutierrez testified that he had taken a leaflet from a handbiller, but that as he started to enter the premises Kazuko Harrell then told him to "hurry up" and "give me that," taking the leaflet from him before he could read it. Harrell did not testify.

In agreement with Respondent I find that the evidence, uncontradicted on the record, is too vague and uncertain to sustain the allegation of a surveillance violation with respect to Iwabuchi. Harrell, however, clearly was confiscating union literature from employees without justification and ordering employees not to take such literature. Respondent does not contend that such conduct was justified. This conduct violates Section 8(a)(1) of the Act. *General Motors Corporation*, 239 NLRB 34 (1978).

j. Various preelection allegations of surveillance

The General Counsel alleges surveillance of employees' union activities in July by Takemoto, Robinson, Iwabuchi, and Taki and, during the same period, imposition of more onerous working conditions by Iwabuchi, Taki, and Takemoto.

Witnesses Kubota, Sakuma, and Murakami testified to being closely watched or followed about the premises during the period preceding the election. There was evidence that this conduct was different from the previous practice of Respondent's agents and followed upon Respondent learning of employees' union activities. The principal circumstance testified to was the alleged surveillance of employees in the kitchen when eating meals. Murakami testified that Takemoto stood directly behind employee Sakuma and her while they were off duty eating in the kitchen. When Murakami asked Takemoto if he were going to eat, he merely grunted and remained behind them for some 4 to 6 minutes. Sakuma testified to a similar event on a different date. Kubota also testified to meal surveillance as well as to general close examination by Respondent's agents.

As noted previously, Respondent's agents, save for Taki, did not testify. The surveillance testimony was therefore substantially unchallenged by Respondent. It remains however, to determine if the testimony, even undenied and fully credited, sustains the allegations. Respondent correctly cites the Board's decision in *Two Wheel Corp. d/b/a Honda of Mineola*, 218 NLRB 486 (1975), for the proposition that subjective impressions drawn from employer conduct at the facility cannot form the basis for an inference of surveillance. In agreement with Respondent, I find that testimony of the witnesses concerning their perceptions of being watched during their work to be insufficient to sustain the General Counsel's burden of proof that this conduct constituted illegal surveillance.

The meal surveillance testimony, however, includes objective observations by witnesses concerning specific events and circumstances. Employees, known to be engaged in union activities, were unusually and closely at-

tended by Respondent's agents during their meal break in a manner reasonably calculated to inhibit discussion of the Union and to create the impression of surveillance of their activities. The credible evidence shows that the conduct was unusual and—contrary to Respondent's argument that its agents have a right to be in the kitchen area—solely directed at the employees during their meals. I find therefore that, unlike the general testimony that employees felt under surveillance, this testimony concerning meal surveillance is sufficient to sustain the General Counsel's burden of proof as to this allegation. Accordingly, I find that by surveilling employees during their meals in July 1979, and by creating the impression of surveillance, Respondent violated Section 8(a)(1) of the Act.

k. *The July 4 day off*

Respondent traditionally closed for luncheon service on the July 4 holiday, while still remaining open for dinner service. In 1979, during the preelection period, Respondent closed for the entire July 4 holiday, thus providing employees with the entire day off rather than only the luncheon period. No hourly employees were paid for time not worked during or prior to 1979. Taki testified that she gave the time off because of her perception that the workload of employees had been heavy and that both she and the employees could use the rest. Employees were informed that this was the basis for the closure.

Respondent in its brief notes that, inasmuch as the time was unpaid, the General Counsel's argument that the time off was a benefit is questionable and depended "upon the value each employee placed upon unpaid free time relative to work." While conceding the validity of this statement, I find that Respondent intended, by Taki's own testimony, that the time off be restorative and of benefit to employees. Further, I find that the granting of the time off, albeit unpaid, may reasonably be considered to have been perceived as a benefit by a significant number of employees.

Benefits granted during the preelection period are suspect absent evidence that they were granted for reasons other than the pendency of the election. "The burden of establishing a justifiable motive remains with the Employer." *The Baltimore Catering Company*, 148 NLRB 970, 973 (1974). I do not find that the perfunctory press of business explanation given by Respondent constitutes a justifiable motive. Respondent had 52¹⁶ employees on May 30, 1979, and between 49 and 54 throughout June 1979 with the larger number employed in the later days of the month. This is insufficient to show that business pressure or a shortage of personnel required that extra time off be awarded. Further, at least with respect to employee Kubota, employees were on shortened hours during this period and were willing to work additional hours but were not given the opportunity.

Further, as the Supreme Court noted in *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 410 (1964):

¹⁶ These figures include those employees whose supervisory status was in issue.

Other unlawful conduct may often be an indication of the motive behind a grant of benefits while an election is pending and to that extent it is relevant to the legality of the grant

Here in the context of the other unfair labor practices designed to influence the outcome of the election, I have no difficulty finding the granting of the extra time off on July 4 an improper inducement to employees in violation of Section 8(a)(1) of the Act.

4. Postelection conduct

a. *September 1979—alleged interrogation of Gutierrez by Taki*¹⁷

On September 6, 1979, Taki and Gutierrez discussed Gutierrez' recollections of the Iwabuchi-Leyba incident. Taki disputed Gutierrez version. While the General Counsel contends Taki sought to induce Gutierrez to "change his story," I find this to be true only in the sense that she disputed his version.

Taki, who testified she had relied on the version of Iwabuchi in firing Leyba—a version which was contested by others—had a legitimate business interest in discussing the matter with other witnesses. The conversation was free of threats or promises of benefit conditioned on a change by Gutierrez in his version of events. I do not find Taki's conduct violates Section 8(a)(1) of the Act. I shall dismiss this allegation of the complaint.

b. *November 1, 1979—Battery of Kubota—Takashi Iwabuchi*

After Kubota was told by Taki that she was discharged on November 1, 1979, she had a conversation with Iwabuchi. It terminated with Iwabuchi indicating that he never wanted to see her again and violently grabbing and pushing her away. Iwabuchi's battery was clearly related to Kubota's union activities and her participation in the October 27 demonstration, conduct which I find, *infra*, to be protected. No defense of *moliter manus imposuit* will lie here. The battery was unprovoked and unjustified. Further it is consistent with Iwabuchi's battery upon other union supporters. In agreement with the General Counsel, I find this conduct violated Section 8(a)(1) of the Act.

C. *Allegations of 8(a)(3) Violations*

1. February 1979 reduction in the hours of Lucien Teru Kubota

Kubota commenced work as a waitress in the teppan room of Respondent on January 20, 1978. Kubota worked 5 days a week on the luncheon shift until February 1979, at which time her hours were reduced. While there was some dispute as to whether or not her schedule was reduced to 2 days a week and subsequently increased to 3 days a week in March 1979, it continued at

¹⁷ This meeting is also discussed as part of my analysis of the allegation that Gutierrez' hours were illegally reduced, *infra*.

3 days a week until her termination on November 1, 1979.

Sometime during late 1978 Taki was told by an acquaintance that Kubota was a person who caused difficulty. Taki testified that she did not take this remark seriously because Kubota was a satisfactory employee at that time. The remark was not clear as to the context of Kubota's alleged troublemaking.

On Monday, February 12, 1979, Kubota learned of a dispute or difficulty employee Okuma was having in utilizing Respondent's health insurance for his children. On February 14, Kubota approached Okuma and informed him that she had heard about his difficulty with respect to his health insurance and that "if you need my help, I can get other people to help out also." At this point Kubota realized that Taki had come to be standing nearby and the conversation ended.

Kubota and several other employees that week held meetings away from the facility concerning Okuma's situation with respect to health insurance and other grievances and complaints. There is no evidence that these meetings or their subject matter was known to Respondent.

On February 15, 1979, a large luncheon party being served by Kubota had occasion to leave without paying their check.

The following day Taki and Katsumi, the head of the teppan section, discussed the unpaid check and Kubota's performance. Taki testified they came to a conclusion that Kubota's hours should be reduced. Subsequently, Kubota was called in and the three discussed the check incident and the fact that Kubota's hours were being reduced.

The theory of the General Counsel is that Kubota's reduction in hours was not based on punishment for her failures, if any, but rather because of her protected concerted activities in offering assistance to employee Okuma and/or meeting with employees to discuss working conditions generally.¹⁸ The General Counsel has failed to sustain its burden of proof with respect to this allegation. There is no evidence that Respondent knew of the meetings Kubota had with employees concerning working conditions or any certain evidence that these meetings occurred before the decision to reduce her hours. Further, there is insufficient evidence to conclude that Kubota's conversation with Okuma, arguably overheard by Taki, would have generated animus against Kubota.¹⁹

In addition to the weakness of knowledge and animus described above, Respondent offered a plausible motive for the reduction in hours of employee Kubota. Both

Sakuma and Murakami, employees of Respondent, had their hours reduced as a result of Respondent's dissatisfaction with their performance. Kubota's reduction in hours followed hard upon a mistake which was of a type and degree of significance sufficient to justify the reduction in hours. I credit Taki's testimony that her actions were based not entirely upon the mistake of February 15, 1979, but rather upon her perception that Kubota was insufficiently humble or willing to admit guilt or carelessness. I am satisfied that, as to this incident, occurring before employee union activities or Respondent's knowledge of union activities, Taki's actions were based not on the protected concerted activities of Kubota but on Taki's determination to discipline Kubota both for her mistake and for her attitude to her work and supervision. Accordingly, I shall dismiss this allegation in the complaint.²⁰

2. Discharge of Kubota—November 1, 1979

On November 1, 1979, Respondent terminated Kubota and presented her with a letter indicating she was discharged for:

... direct participation in the mass demonstration on the restaurant premises during active business hours, designed to interrupt and interfere with the business activities of the restaurant and to discourage customers from patronizing the restaurant.

As part of the demonstration, you encouraged and participated in the unlawful trespass into the offices of restaurant officials and the illegal photographing of a company representative.

Your continued employment with the knowledge of customers who observed the demonstration would be a continuing condonation of such unlawful conduct and cannot be tolerated.

The General Counsel argues first that Respondent's asserted grounds for termination are insufficient and that "her alleged misconduct does not justify her discharge." Further, it argues that "the real motivation for her discharge was in retaliation for her leading role in the Union organizational campaign." Respondent asserts the sole reason for Kubota's discharge was her participation in a demonstration.

The General Counsel presented evidence which it believed showed that during the union campaign Respondent harassed Kubota by reprimanding her for "*de minimis* errors." It also notes the conduct involving Kubota alleged as violative of Section 8(a)(1) of the Act and discussed *supra*. Respondent introduced evidence intended to show that Kubota's work record was unsatisfactory

¹⁸ Inasmuch as no union activities had occurred during this time, it seems clear that the General Counsel's theory sounds only in Sec. 8(a)(1) rather than Sec. 8(a)(3), which is predicated upon discrimination based on union activity rather than protected concerted activity.

¹⁹ To the extent that the General Counsel's animus theory seeks support in the "troublemaker" remarks to Taki in 1978, the evidence is insufficient for two reasons. First, there is no evidence that the basis for the "troublemaker" remark was Kubota's earlier participation in protected concerted activity of the type sufficient to sustain an 8(a)(1) violation here. Second, and most importantly, the remark is so distant from the events in question that it cannot form the basis for conduct in February 1979.

²⁰ At the hearing certain testimony was received concerning statements made by former employee Katsumi to Kubota concerning Respondent's motivations. These statements are clearly hearsay and would be admissible for their truth only as an admission by party opponent pursuant to Fed. R. Evid. 801(d)(2)(D). These statements made to Kubota, even assuming Katsumi to have been a statutory supervisor, were made after Katsumi terminated his employment with Respondent. Statements made by a former agent after the end of the agency relationship do not fall under the rule. Thus, the evidence is properly excluded as hearsay if offered for the truth of the statements.

during this period and that its criticisms of Kubota were based on work-related difficulties, not her union activities.

I deem it unnecessary to examine this evidence further, for I am convinced that the conduct not separately alleged as violative of the Act which occurred before the demonstration on October 27, 1979, is not determinative in resolving the question of the propriety of Kubota's termination on November 1, 1979. The October 27, 1979, demonstration, if sufficient grounds to support the termination of Kubota by Respondent, justifies her termination even if earlier preelection animus existed because of her leading role in advocating a union at Respondent. Equally, in the event that the October 27, 1979, demonstration and her conduct therein does not justify the termination of Kubota, it is unnecessary to inquire further for potentially illegal bases for her termination. Accordingly, I shall limit the analysis here to an examination of the October 27, 1979, events and their consequences.

October 27, 1979, Saturday, was a normal business day for Respondent. The dinner period on Saturday is normally busy. The restaurant opened for dinner at 5 p.m. Soon thereafter a demonstration commenced outside the restaurant, participated in by Kubota and others.²¹ The demonstration's purpose, known to Respondent, was to raise questions about the recent arrest by the U.S. Immigration Department of former employee Sato, to protest the discharge of Rosario Leyba, and to publicize other matters concerning Respondent's terms and conditions of employment and the fact that the Union had not been successful in gaining representation at Respondent. Handbills were circulated in English and in Japanese.

At approximately 5:30 p.m. approximately 30 of the demonstrators, including Kubota, entered the restaurant by means of the main customer entrance, one of several entrances to the facility. The demonstrators filed down the stairs, through the lobby, and down a corridor into the administration portion of the facility. There they confronted Taki in her office. Following remarks between Taki, Jiro Robinson, and unidentified demonstrators, the demonstrators reversed their course and filed out of the restaurant. The group then resumed the demonstration outside of the facility for a short period whereupon the demonstration ceased and the demonstrators left.

The specifics of the events in the restaurant on October 27 are in dispute. Kubota testified that she was a passive participant far back in the necessarily strung out body of demonstrators as it entered and exited the restaurant. She testified further that the demonstrators were in the restaurant for approximately 5 minutes and that during their period in the restaurant they were quiet and orderly. Receptionist Connie Soto testified that Kubota was essentially in the forefront of the demonstration. She testified further that as the demonstrators entered and left they chanted the name "Horikawa" and additional words in Japanese which she could not understand. Differing with Kubota, Soto testified that there were customers in the general reception area and a significant

number of customers in the restaurant as a whole during the events.

I find that Soto credibly testified to the number of customers in the restaurant and their location at the time the demonstration commenced. This testimony was corroborated by the scheduling and reservation records prepared that evening which showed the number of customers in attendance. I likewise credit Soto's memory of the chanting of demonstrators as they entered and exited the facility. Soto's testimony in this regard was clear and it is likely that she would remember such events as she was located near the stairs the demonstrators used. While Soto was angered by the situation and accordingly may not have been perceiving events or recalling them as accurately as might have been the case had she been less emotional at the time, I am convinced that her recollection was accurate. Further, Connie Soto has no interest in the outcome of this proceeding and, while she appeared to have a clear loyalty to both Taki and Respondent, I do not believe that loyalty affected her testimony concerning the events. Kubota's recollection, it seems to me, would be more likely confused and inaccurate given her position in a group of demonstrators and because of the fact that she had recently participated in the street demonstration. Kubota, whom I accept also as an honest and straightforward witness, has a clear stake in the outcome of the case and would be less likely to have observed the disruptive impact of the demonstration as a participant.

With respect to the location of Kubota in the body of demonstrators as it entered into the restaurant and exited, I find it unnecessary to resolve the question. It is possible to harmonize the apparent inconsistency between the testimony of Soto and Kubota in that Kubota may have been more to the front of the demonstration, unable to ascertain her exact position because of the crowd, hence recalling a middle location. Soto, however, may have observed her as more in the forefront of the group and therefore recalled her as being at its head. It is clear, however, from the testimony of Taki and Kubota that Kubota did not engage in conversation with Taki in her office. In this regard I find that Soto, who testified she heard Taki and Kubota speaking, was mistaken, having confused Kubota's voice with that of another.

Kubota was the only current employee of Respondent participating in the demonstration. Accordingly, no issue of disparate treatment exists. Further, as the General Counsel correctly notes, the Board will not attribute to one individual the misconduct of others grouped with him or her merely as a result of physical association. Accordingly, the role of Kubota alone is to be weighed rather than the actions of other demonstrators who may or may not have undertaken additional activities.²² The incursion, involving the crossing of public areas of the facility where customers were located, was nonviolent and did not involve threats or overt disruption other than that caused by the physical presence of the demonstrators and their chanting during ingress and egress.

²¹ The demonstration was no surprise. The local Japanese language newspaper carried an article indicating that a demonstration would be held in front of the restaurant.

²² For example, the photographing of the office manager, which was concededly done by an individual other than Kubota, is not attributable to her.

No party contends that the demonstration did not concern perceived unfair labor practices and/or working conditions at Respondent's facility. Such a demonstration, even though it involved but a single employee of Respondent, constitutes protected concerted activities. *Washington State Service Employees State Council No. 18, etc. (Jill Severn)*, 188 NLRB 957 (1971). The issue then is whether or not Kubota's actions in entering the restaurant in the context of her protected concerted activity rendered her activities unprotected and, hence, her discharge not illegal.

Respondent argues that the conduct of the demonstrators, Kubota included, constituted a trespass. Whether or not the conduct constitutes a trespass is a matter for the state and local authorities and is not necessary to determine in order to resolve the issues before me.²³ Respondent analogizes the conduct of Kubota here to the conduct of individuals in *Hotel and Restaurant Employees and Bartenders Union, Local 2 (Zim's Restaurants, Inc.)*, 240 NLRB 757 (1979). There, agents of a labor organization were found to have violated Section 8(b)(1)(A) of the Act by entering a restaurant's public areas while customers were being served. Respondent argues that the type of conduct found violative of the Act there should be held unprotected in the instant case. Respondent's analogy is not apt. Section 8(b) of the Act proscribes certain conduct by a labor organization and is not derivative of the rights guaranteed in Section 7 of the Act as are the provisions of Section 8(a). Thus, it is not necessarily true that conduct prohibited to agents of a labor organization is unprotected or proscribed conduct when undertaken by employees. See, e.g., *N.L.R.B. v. Long Beach Youth Center, Inc.*, 591 F.2d 1276 (9th Cir. 1979). The Board's standards against which Kubota's conduct must be measured are those dealing with alleged employee misconduct as a defense to a discharge for protected activity.

Respondent cites *Crenlo, Division of GF Business Equipment, Inc.*, 215 NLRB 872 (1974), for the proposition that unauthorized entry into a facility by an employee, even in the context of protected concerted activities, is an unprotected act. In *Crenlo*, however, the employee involved violated a valid rule prohibiting unauthorized entry into the plant premises and had been warned by two supervisors at the plant entrance that he was not authorized to enter the plant and that an unauthorized entry would subject him to disciplinary action. The record in the instant case does not reflect any rule concerning entry into the public or nonpublic areas of the restaurant by employees on nonworking time.²⁴ Indeed, the record is replete with evidence that employees between luncheon and dinner service, nonworking time, entertain themselves in the office and/or in a television room. There was other evidence presented that some employees came to the facility on their days off. The record does not reflect that these employees were disciplined for such conduct.

²³ See *Retail Store Employees Local 1001 (Levitz Furniture Company of Washington, Inc.)*, 203 NLRB 580, 581 (1973).

²⁴ The record contains the building owner's rules; however, no evidence concerning enforcement was introduced.

The General Counsel argues first that the demonstration constituted an unfair labor practice strike. Second, it argues that Kubota's

... termination must be viewed in the context of a picket line misconduct case, where there must be a balancing of the employees misconduct, if any, with the unfair labor practices which led to it to determine whether reinstatement should be barred.

The fact that Kubota was not withholding her services from Respondent but was rather demonstrating on her off time does not diminish her rights under the Act. *Edir, Inc., d/b/a Wolfie's*, 159 NLRB 686 (1966). Handbills distributed by the demonstrators clearly indicated that the purpose of the handbilling was to protest Respondent's unfair labor practices. Included in the handbill was reference to the allegation discussed, *infra*, of the Iwabuchi-Leyba assault and discharge. As I find, *infra*, Respondent committed an illegal assault and battery upon and illegally terminated Leyba. As a consequence, I find that the demonstrators were protesting unfair labor practices by Respondent.

Looking to the conduct of Kubota in the instant case, she did participate in an unauthorized entry into the public and private areas of the restaurant during the working hours of other employees at a time when she was not scheduled to work. She, along with the other demonstrators, clearly had an impact, albeit nonviolent and limited in time, on the business operations of Respondent. Customers were exposed to the sights and sounds of the demonstrators.

The Board has long considered sit-ins or plant seizures to be unprotected. *N.L.R.B. v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939). The Board has distinguished both situations from temporary occupancy by employees where seizure is not attempted or affected. *Lee Cylinder Division of Golay & Co., Inc., etc.*, 156 NLRB 1252 (1966), *enfd.* in pertinent part 371 F.2d 259, 262-263 (7th Cir. 1966), 387 U.S. 944 (1967). *Pepsi Cola Bottling Co. of Miami, Inc.*, 186 NLRB 477 (1970), and cases cited therein.

Under the standards enumerated in the above-described cases I find that Kubota's conduct in entering the restaurant, moving through public areas into the administrative area, and then withdrawing by the same path, did not constitute misconduct sufficient to justify her termination. This is particularly so where the demonstration involved protest of Respondent's unfair labor practices.

In summary, I have found that Kubota was discharged because of her actions on October 27, 1979, and not because of her activities on behalf of the Union. Accordingly, the General Counsel's allegation that Kubota was discharged in violation of Section 8(a)(3) of the Act is without merit and will be dismissed. I have further found, however, that Kubota was engaged in protected concerted activities on October 27, 1979. Having found her conduct to be protected and having further found that her misconduct in entering the restaurant, as described above, did not on balance justify terminating her employment, it follows that Respondent has discharged

her because of her protected concerted activities in violation of Section 8(a)(1) of the Act.

3. The alleged assault and battery upon and discharge of Rosario Leyba

The General Counsel alleges that Rosario Leyba was assaulted and discharged on August 25, 1979, because of his remarks concerning the Union. Respondent denies neither that an altercation occurred nor that Leyba was terminated as a result. It argues first that Leyba became involved in an altercation as a result of his own misconduct and second that his termination was not in any way based on forbidden considerations. It argues further that, even if Leyba was somehow involved in making statements concerning the Union, the terminating official, Taki, was ignorant of such conduct, discharging him solely for his disruption of a meeting and participation in an altercation.

Leyba commenced employment with Respondent sometime in May 1979; his last day of employment was August 25, 1979. There is no evidence that he was actively involved on behalf of the Union or that he signed an authorization card. He testified at the hearing through an interpreter. Based on his testimony I find his knowledge of English was limited.

On the afternoon of August 25, 1979, a meeting was held in room A-6 at Respondent's facility. Approximately 10 Latino kitchen and busboy employees were present. The meeting was conducted by Assistant Manager Iwabuchi who addressed the employees in English. Iwabuchi does not speak Spanish; many of the employees did not speak English. Several bilingual Latino employees translated his remarks into Spanish as did on occasion Leyba in a disjointed manner. During the meeting Iwabuchi addressed various rules and requirements applying to employees at the facility. He also discussed an anticipated employee excursion to Las Vegas. Leyba apparently indicated an interest in borrowing a set of clothes from Iwabuchi and Iwabuchi responded that he could borrow a suit. At this point the versions of the event differ.

In response to Leyba's next remarks, Iwabuchi asked Leyba to leave, grabbed him, and manhandled him out into the hall in a violent and aggressive manner. In the hall Iwabuchi struck Leyba several times in the face bloodying his nose.²⁵

Taki arrived in the hall almost immediately after Iwabuchi's blows had been struck. She and Iwabuchi conversed briefly in Japanese and then she told Leyba he was terminated—a statement Leyba did not recall, but which I credit occurred. Leyba was directed to a separate room while Taki continued to room A-6. There she informed the employees that Leyba was terminated. The meeting then continued. Briefly Leyba entered the room, but left after retrieving a personal item. Soon thereafter Leyba left the premises without talking to Taki further.

²⁵ Respondent attacks the testimony of Leyba and Gutierrez concerning the altercation by pointing out inconsistencies in the details of the events. I am satisfied that the general description of events above is correct. No testimony was adduced to challenge the witnesses. Irrespective of the details, the occurrence of a brutal assault and battery was uncontradicted.

He had not been offered reinstatement as of the time of the hearing.

It is clear that Leyba's behavior and remarks at the meeting are of critical importance to resolving the issues of his termination. The issues were closely litigated.

Respondent introduced a variety of evidence to demonstrate that Leyba was under the influence of alcohol or marijuana during this meeting. Leyba denied use of drugs during the time preceding the event although he admitted to consuming two beers at or about the noon hour. Employees who testified said they were unable to conclude Leyba was intoxicated at the meeting. Taki testified that when she came upon Iwabuchi and Leyba in the hallway immediately after the event Leyba's eyes appeared glazed and out of focus and from this she concluded he was either drunk and or under the influence of marijuana. Testimony was adduced that later that same day Leyba was taken to the hospital following an injury at his residence. In the hospital he was diagnosed as under the influence of alcohol.

I find that Leyba was not under the influence of alcohol or drugs at the meeting. Other than the reference to the consumption of beer, in an amount insufficient despite the diminutive size of Leyba to justify a finding of inebriation, there is no evidence that Leyba either consumed alcohol and/or drugs before the meeting. Respondent did show that Leyba was told he was terminated by Taki following the altercation and that he forgot this statement. Later in the day Leyba was under the influence of alcohol. I do not find these facts sufficient to make a finding that he was under the influence of alcohol at the meeting. Being struck three times in the face by a fist well excuses Leyba's glassy eyed countenance and his failure to recall or retain Taki's statement to him terminating him. His inebriation later in the day is also well explained by the earlier, clearly traumatic events. I find this evidence relevant only to demonstrate the acute distress Leyba suffered as a result of the cowardly attack by Iwabuchi. I specifically reject it as sufficient to demonstrate Leyba's inebriation at the meeting in the face of his specific denials and the absence of testimony from the other witnesses that he appeared inebriated before or at the meeting.

Leyba generally was not a good witness. This was true not so much because he appeared to be attempting to distort the truth, but rather because his responses were often conclusionary and on some occasions entirely unconnected to the questions posed. Indeed, his statement concerning what he said immediately before Iwabuchi ejected him from the meeting was itself conclusionary and imprecise. Leyba testified:

... and then I went in and started conversing with the dishwashers, no? that it was bad some of the things, that there were so many things for nothing. And then I got the Union in there. I was commenting regarding that with the companions.

Daniel Gutierrez testified that Leyba was repeating Iwabuchi's remarks in Spanish.

... [a]fter he hear everything, he said, Oh, if we have the union, we would have benefits, but Mr. Iwabuchi didn't understand what he said, because he said it in Spanish. He said, What did he say? One of the—other employees, I think Ricki Ortiz, he translate [sic] for Iwabuchi, and Iwabuchi got mad, at this.

When asked by counsel for Respondent his opinion of what Leyba had said which caused Iwabuchi to expel Leyba from the room, Gutierrez repeated the statement "if we had the union we would have benefits."

Ricki Ortiz testified that Leyba, who had been speaking in Spanish with other employees during the discussion of the trip to Las Vegas, added in English, "what other benefits are we going to get out of this whole thing" or "going to get out of this." Ortiz was one of the individuals actively translating Iwabuchi's remarks from English to Spanish and, apparently, employee comments from Spanish into English. He particularly recalled that Leyba's remarks concerning benefits were in English so that he did not have to translate them. Ortiz, in his role as translator, had occasion to listen carefully to the remarks in Spanish and, even if less so in English, would be more likely to have an accurate recollection of what was said than a spectator who did not have an obligation to translate the remarks of the parties. His version differs from that of Gutierrez, likewise an active interpreter at the meeting, who recalled that Leyba spoke in Spanish. Gutierrez struck me as a straightforward witness trying with accuracy to state what he recalled having been said at that meeting. Again as a semiofficial translator he would have been likely to have given close attention to what was said by the parties so as to render an accurate translation of the remarks. Thus, there is a slight but significant difference between the version of Ortiz and Gutierrez concerning Leyba's remarks both as to the exact words spoken and the language in which the remarks were made.

The testimony of Olivares who also rendered translation at the meeting was that he was not listening carefully to Leyba's remarks and did not hear Leyba's final comments. He testified that he did not translate Leyba's remarks to Iwabuchi or hear anyone else translate for Iwabuchi. Since he was seated next to Iwabuchi he was in a position where he would have been likely to have heard such a translation if it had been made.

I credit Gutierrez' testimony as partially corroborated by Leyba that Leyba mentioned the Union in the context of dissatisfaction with benefit levels and that in response Iwabuchi attacked and excluded Leyba. I discredit the other witnesses to the extent their testimony is inconsistent. I make this determination in part based on demeanor. Generally, I believe these witnesses merely did not observe all the events, failed to overhear those things testified to by Gutierrez, or were simply mistaken. I also draw the inference that, were Iwabuchi to have testified, his testimony would not have been helpful to Respondent.

The evidence further convinces me that, although Leyba was acting as an *ad hoc* translator who did not contribute to the smooth flow of information at the

meeting, the translation process was being carried on in a largely person-to-person manner. Thus, I do not find that Leyba's performance up until his union remark, although it may well have gained Iwabuchi's displeasure, was the cause of Iwabuchi's attack. Rather, I find Leyba's remark about the Union was the triggering event and the cause of Iwabuchi's conduct.

Having made the factual determination that Leyba specifically mentioned the union in a remark concerning benefits, it should be noted that such a credibility resolution is not necessarily critical to a resolution of the issues presented by the Iwabuchi/Leyba incident. All witnesses who testified concerning Leyba's remark recalled that Leyba mentioned benefits. I have found and the record is clear that these remarks triggered the assault and battery upon him. Ortiz, who was not employed during the election campaign, testified credibly that he and other employees took Iwabuchi's remarks in the context of the recent union defeat. I find little difference under the facts and circumstances of the meeting, whether or not Iwabuchi's assault was provoked by a reference to the need for greater benefits alone or by a specific reference to the Union. It is clear in the context of events, and Respondent reasonably could have expected, that in either case the employees would take Leyba's remark, as Iwabuchi did, as a hostile reference to the continuing conflict concerning the union organizational drive. I have evaluated Respondent's actions in that context.

I find, based on all of the above, that Iwabuchi committed assault and battery upon Leyba because of Leyba's remarks concerning the Union. Both the assault and battery—a severe and savage attack without justification or excuse—and the termination of Leyba, with its concomitant effect on the Section 7 rights of the observing employees, violated Section 8(a)(3) and (1) of the Act.

Respondent argues that its agent Taki was innocent in making the decision to terminate because of her belief that (1) the events were provoked by Leyba and that (2) Leyba was under the influence of alcohol or marijuana. Given my findings with respect to Iwabuchi's motive and his agency status, Respondent cannot escape liability for the discharge based on the purported innocence of Taki. Respondent may not terminate an employee for an altercation—and this was not an altercation but rather a simple attack on a nonresisting individual²⁶—where that event was caused entirely by Respondent's agent punishing an employee for his remarks with respect to the Union. Where a respondent's agent has provoked or, as here, caused an event, no punishment, however innocent, can be administered without responsibility being allocated consistent with the motive of the original guilty agent.

In summary, I find, based on all of the above, that Respondent terminated Leyba because of his remarks concerning the Union and, further, that Leyba engaged in no misconduct sufficient to justify his discharge. Rather,

²⁶ Respondent argued that it was incredible that Leyba offered no resistance to Iwabuchi. I disagree. Nor do I find the failure to resist as any indication of guilt on Leyba's part for argued misconduct earlier in the meeting.

I find that the misconduct attributed to Leyba was entirely based on the wrongful acts and conduct of Iwabuchi, an agent of Respondent. I therefore find that Respondent terminated Leyba because of his statements with respect to the Union and thereby violated Section 8(a)(1) and (3) of the Act.

4. The alleged constructive discharge of Tomio Sakuma

Sakuma was the victim of a variety of illegal conduct directed against him because of his union activities as discussed *supra*. The conduct directed against him however ended or significantly reduced after the election. It was not until about August 4, 1979, some 2 weeks after the election, that Sakuma submitted his resignation to take effect on August 14, 1979. During the postelection period there was no evidence that illegal conduct of any kind was directed against Sakuma. In addition, certain actions were taken by Respondent which seemed to indicate, now that the union election was behind all, a new spirit of goodwill would prevail.

The harassment of Sakuma for his union activity by Iwabuchi, Robinson, and others, including insults, an assault and battery, and on one occasion being squirted with carbonated beverage, along with the threats previously described, were improper and illegal. Such behavior is not to be lightly construed. Yet it was hardly, as the General Counsel would characterize it, "a ferocious reign of terror." This is especially true after the election. The General Counsel admits and I find that Sakuma retained his employment through the election, despite this conduct, because he felt an obligation to other employees as a leader of the union campaign to continue the union campaign through to the election. I do not find Sakuma quit because of Respondent's unfair labor practices. I find that the triggering event causing Sakuma's termination was the Union's loss of the election, a factor which is not properly considered, even if caused by objectionable conduct by the employer.

Under all of these circumstances I do not find that Sakuma's resignation rises to the level of a constructive discharge. I so find, first, for the reason that the quantum and type of unfair labor practices committed against Sakuma was insufficient to cause him to quit and, second, because of the substantial hiatus between the end of Respondent's misconduct against Sakuma and his resignation. Accordingly, I shall dismiss this allegation of the complaint.

5. Reduction of Daniel Gutierrez' working hours

As I have found, *supra*, Respondent relied on Gutierrez during the election campaign as a source of information with respect to Latino employees' union sentiments. During this period there is no evidence that Respondent harbored animus toward Gutierrez. This changed however, on the day Rosario Leyba came in to pick up his check.²⁷ Gutierrez testified that he and busboy Manuel

Lopez were questioned by Taki regarding their observations of the Iwabuchi Leyba altercation. In that conversation it became clear that each disagreed with the version proffered by Taki.²⁸ The General Counsel contends that this conversation forms the basis of Respondent's animus toward Gutierrez resulting in a virtually immediate reduction in Gutierrez' hours.²⁹

Gutierrez testified that a new work schedule was posted on the Monday following his conversation with Taki. He testified that his hours were cut for the first time on this schedule. The Monday following September 6, 1979, was September 10, 1979. The parties stipulated, based on documentary evidence, that Gutierrez returned to school on September 10, 1979, and continued in attendance through the academic term. His classes continued until 11:30 a.m. each day.

Gutierrez testified that his hours had been cut before he determined to return to school. He testified that he attended classes because his hours were cut—rather than the reverse. He also testified that he sought additional hours from Taki and Iwabuchi unsuccessfully and that on no occasion had he asked for a change in his work hours to accommodate his new school schedule. Taki testified, in opposition to Gutierrez, that Gutierrez and a second individual, whose name she recalled only as "Phillips," each requested a reduction in hours to accommodate an academic schedule.

Taki testified without contradiction that it was impossible to work as a busboy on the luncheon shift if one was not available until 11:30 each morning. Further, Gutierrez testified that when he attended school previously he had only worked part time. Only when he finished that earlier academic session had Taki asked him to work additional hours.

Conceding to the General Counsel his argument concerning potential animus toward Gutierrez by Taki, I find the evidence is insufficient to sustain the General Counsel's burden of proof that Gutierrez' hours were cut by Respondent as a result of that animus. The records of Gutierrez' school attendance, as stipulated by the General Counsel, indicated that he commenced attendance on September 10, 1979, the date the new schedule reducing his hours was posted. The evidence is uncontradicted and I find that the hours Gutierrez attended were inconsistent with lunch shift work. It was Gutierrez' lunch-shift hours that were eliminated.

Thus, I find the General Counsel's claim of discriminatory treatment, which supposedly occurred before Gutierrez determined to resume his schooling, completely impeached by the fact that Gutierrez commenced his schooling simultaneously with the posting of the schedule which call for a reduction in Gutierrez' hours. Gutierrez' testimony was also impeached by school attendance records which contradict his testimony that it was only after his hours were reduced that he determined to

²⁷ Gutierrez did not recall the date of his conversation with Taki other than that it took place on the same day that Leyba returned to the facility to pick up his check. He estimated that it occurred approximately 2 weeks after Leyba's August 25, 1979, discharge. Other evidence, includ-

ing the date on the check Leyba received, establishes this conversation as occurring on September 6, 1979.

²⁸ This event is discussed in greater detail, *supra*.

²⁹ Gutierrez testified that Manuel Lopez' hours were also cut at the same time. The General Counsel, however, has not alleged this reduction in hours as a violation of the Act nor was it litigated.

attend school. Gutierrez' recollection of these events being plainly incorrect. I further conclude that Taki's testimony that Gutierrez asked for the reduction in hours must be credited over the general denial of Gutierrez that he did not ask for special consideration because of school. Accordingly, I find that his reduction in hours was based on his school schedule, an action consistent with Gutierrez' earlier school attendance. I find the reduction in hours therefore free from any possible animus based upon Gutierrez' disagreement with Taki concerning the Iwabuchi/Leyba events. Accordingly, I shall dismiss this aspect of the complaint.

D. The Alleged 8(a)(5) Violation

The General Counsel seeks, as a remedy for the alleged unfair labor practices, a bargaining order predicated upon the allegation that the majority of employees in the unit had designated and selected the Union as their representative. The General Counsel does not contend, nor does the case law support, the proposition that a bargaining order would be appropriate if the Union at no time represented a majority of employees. Thus, the threshold issue to be considered is whether or not the Union had obtained a majority in any relevant period.

The General Counsel submitted 21 union authorization cards which it contends were effective on or before June 6, 1979. Even assuming, *arguendo*, all 21 authorization cards are valid, the unit must not consist of more than 41 employees on June 6, 1979, to preserve the General Counsel's claim of union majority status.³⁰

The General Counsel contends on brief that there were 40 employees in the bargaining unit on June 6. Respondent submitted evidence that 49 employees were in the bargaining unit as of that date. Included among the 49 is employee Tziazio Takuda who was apparently hired on June 3, 1979. The General Counsel contends that, inasmuch as Tokuda's name was not on the preelection list of employees which contained an eligibility cutoff date of June 7, 1979, "his inclusion in the unit on June 6, 1979, is highly suspect." The General Counsel's suspicions aside, there is no evidence which indicates that Tokuda was not employed on June 6, 1979. I find the fact that Tokuda's name was omitted from the voter list insufficient standing alone to rebut the documentary evidence of his employment.³¹ Accordingly, I find Tokuda is appropriately in the unit.

The General Counsel would also exclude from Respondent's unit of 49 employees employees Jiro Robinson and Kazuko Harrell. Inasmuch as I have found these individuals to be supervisors, *supra*, I agree and exclude them from the unit. The General Counsel also seeks to exclude from the unit kitchen chef Tanaka, teppan chef Naito, and sushi chef Oba. It further seeks to exclude kitchen second chef Noritake, teppan room second chef Ueda, and second dining room waitress Shinohara.

With respect to the second chefs and the second dining room waitress, the record reflects only that these individuals attend the weekly section head meetings and that they receive annual bonuses 1.6, 1.7, and 4.6 times greater than general employees, respectively. The record is essentially devoid of any other evidence concerning their status as supervisory employees. Further, at no time during the hearing did the General Counsel contend that these employees were supervisors. Where one party asserts that employees have supervisory status, the burden of proof is upon that party. Here, the General Counsel has failed to adduce sufficient evidence to prove that the second kitchen chef, the second teppan room chef, or the second waitress is a supervisor within the meaning of the Act. Their titles, the relative magnitude of the annual bonus, and the fact that they attend what may be characterized as management meetings are not sufficient or even close to sufficient to cloak any or all of these individuals with supervisory status. Accordingly, I conclude that they are not supervisors and they must be included in the unit for purposes of testing the Union's majority.³²

The evidence with respect to the supervisory status of the kitchen chef, the teppan chef, and the sushi chef is somewhat greater than those of their seconds. Each chef is salaried and receives a bonus from 2.6 to 7 times greater than general employees receive. They, too, attend the section head meetings. The chefs' supervisory status was not litigated at the hearing inasmuch as their supervisory status was first contended by the General Counsel on brief. Nevertheless, the record contains references to incidents in which the chefs have directed employees as to certain tasks or have been associated with requests for wage increases. The record, however, is insufficient to find that any one of the chefs has any of the required indicia of supervisory authority set forth in Section 2(11) of the Act. In view of the General Counsel's burden of proof in this area, I am unable to find in this record that any of them are supervisors within the meaning of the Act and, accordingly, I am unable to exclude them from the unit.³³

The General Counsel has sought to exclude 9 individuals from Respondent's June 6, 1979, list of 49 unit employees. As previously found, employees Harrell and Robinson are supervisors and will be excluded from the unit. The remaining proposed exclusions of the General Counsel have been found to be without merit. Accordingly, I find that the unit on June 6, 1979, contained 47 employees. Thus, assuming the validity of the 21 authorization cards proffered as effective on June 6, 1979, the General Counsel has failed to prove that the Union had been designated by a majority of employees in the unit.

The General Counsel has failed to prove the Union's majority as of June 6 or of any other date during the relevant period. Accordingly, it is unnecessary to determine whether or not the authorization cards submitted were valid for the purpose offered. This is so because, even if

³⁰ The General Counsel selected June 6, 1979, apparently as its most favorable date for the establishing of a majority. It appears that on no other date did the Union have a majority.

³¹ It should be noted the objections filed by the Charging Party in this case include an allegation that the eligibility list contained errors and omissions.

³² These individuals voted without challenge in the July 1979 election.

³³ While the parties entered into a stipulation as part of the election agreement that chefs were not supervisors and were eligible to vote in the election, the General Counsel correctly asserts that such a stipulation is not binding upon me.

all cards were valid, in light of my findings concerning the size of the unit, at no time could the Union have represented a majority of employees. Therefore, I find it unnecessary to make any findings with respect to the validity of authorization cards.

Having found that at no time did the Union represent a majority of employees, I further find it unnecessary to decide whether or not the quantum of unfair labor practices committed by Respondent and their potential impact on any subsequent election render the holding of a new election impossible and require a bargaining order. This is so because the General Counsel does not contend that a bargaining order would be appropriate unless a majority was obtained by the Union at an appropriate time. Accordingly, I shall not direct a bargaining order and I shall dismiss the 8(a)(5) allegation of the complaint.

IV. THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent has terminated the employment of employee Lucy Teru Kubota because of her protected concerted activities in violation of Section 8(a)(1) of the Act, and employee Rosario Leyba because of his union activities in violation of Section 8(a)(3) and (1) of the Act, I shall order Respondent to offer each employee immediate and full reinstatement to his or her former position of employment or, if said position no longer exists, to a substantially equivalent position, without prejudice to any seniority or other rights and privileges to which he or she had been entitled, discharging, if necessary, any replacements hired after the date of his or her discharge. I shall order Respondent to make each employee whole for any loss of earnings he or she may have suffered by reason of its discrimination against him or her by payment to him or her of a sum equal to that which normally would have been earned from the date of the discharge to the date reinstatement is offered, less net earnings during the period. Backpay shall be computed in the manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1950), together with interest calculated in accordance with the policy of the Board set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977), *Olympic Medical Corporation*, 250 NLRB 11 (1980); see also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Inasmuch as the violations found herein involve serious misconduct involving a significant number of employees, I find that the nature and extent of Respondent's unfair labor practices go to the heart of the Act. Accordingly, I shall order Respondent to cease and desist from violating the Act in any other manner. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

V. THE UNION'S OBJECTIONS

Timely objections to the election were filed by the Union and served upon Respondent. The majority of the objections, general in nature, addressed the contentions alleged in the complaint which occurred between the filing of the petition and the date of the election. These

objections addressed the conduct which I have found both to have occurred between the filing of the petition and the election and to have violated Section 8(a)(1) of the Act. Other objections had no evidence offered in their support.

Thus, for the reasons set forth in my unfair labor practice analysis, I find the Union's Objections 1-6, 9-11, 14, 15, 17, and 18 to be meritorious. I recommend they be sustained. *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782 (1962). Objections 8, 12, 13, 16, and 19 had no evidence offered in their support and are therefore without merit. I recommend that they be overruled.

The remaining objections, were they to be resolved, would unnecessarily burden and delay this Decision and would not affect the result inasmuch as the unfair labor practices found above with the parallel objections constitute more than sufficient grounds to direct a new election. Accordingly, I decline to rule on Objections 7 and 20. These objections were litigated as objections only. The contentions are not included in my unfair labor practice analysis, *supra*.³⁴

In view of my recommendations with respect to the enumerated objections above, it is recommended that the results of the election held on July 20, 1979, be set aside and that Case 21-RC-15974 be remanded to the Regional Director for Region 21 for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of bargaining representation.

Further, having found the conduct of the employer precluded a fair election, and upon the request of the Union, I shall recommend that the Regional Director include in the notice of election to be issued in this matter the following paragraph pursuant to the Board's Decision in *The Lufkin Rule Company*, 147 NLRB 341 (1964):

NOTICE TO ALL VOTERS

The election conducted on July 20, 1979, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

Upon the foregoing findings of fact, and the entire record herein, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

³⁴ Objection 7 alleges that the Board's pre-election notice was partially covered during the time before the election. Objection 20 alleges certain misrepresentations by Respondent in its campaign material.

3. Respondent has violated Section 8(a)(1) of the Act by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and by unlawfully discharging employee Lucy Kubota for engaging in protected concerted activity.

4. Respondent has violated Section 8(a)(3) and (1) of the Act by unlawfully discharging employee Rosario Leyba because of his remarks concerning the Union.

5. The unfair labor practices specifically found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not engaged in any other violations of the Act, except as specifically found above.

On the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³⁵

The Respondent, G.T.A. Enterprises, Inc., d/b/a "Restaurant Horikawa," Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about their union activities, the union activities of other employees, or employees' opinions concerning the Union.

(b) Interrogating employees about how they intend to vote in an election to determine whether or not a union should represent them.

(c) Engaging in surveillance of employees' union activity or creating the impression that their activities are under surveillance.

(d) Threatening employees that they might lose their jobs, might be unable to work, or might suffer reduction in benefits or other terms and conditions of employment, should the Union win a NLRB election or otherwise be designated as the employees' representative.

(e) Granting employees additional unpaid time off in order to influence employees to vote against the Union.

(f) Threatening to have employees deported or threatening to get even with employees because of their activities or sympathies on behalf of the Union.

(g) Threatening employees with physical harm or actually striking, grabbing, or pushing employees because of their activities or sympathies on behalf of the Union.

(h) Soliciting employee grievances while creating the impression that such grievances will be remedied in order to discourage employee support for the Union.

(i) Promising employees increased benefits such as dental insurance in order to discourage employee support for the Union.

(j) Confiscating union literature from employees or prohibiting employees from taking union literature from union supporters on public property.

(k) Scheduling employee meetings so as to prevent employee attendance at union meetings.

(l) Discharging employees because they ask questions concerning benefits if the Union were to represent employees or because employees act in concert with others to protest Respondent's unfair labor practices.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all of such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer to Lucy Kubota and Rosario Leyba immediate and full reinstatement to their former jobs or, if such jobs are no longer available, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges, discharging, if necessary, any replacements hired after the date of their unlawful discharges.

(b) Make the employees named above whole for any loss of earnings which they may have suffered by virtue of the discrimination against them by paying them an amount equal to what they would have earned from the date of their discharge to the date that they are offered reinstatement with appropriate interest. Such sums are to be computed in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Los Angeles, California, facility copies of the attached English language notice marked "Appendix"³⁶ and its Japanese, Korean, and Spanish language versions.³⁷ Copies of said notices, on forms provided by the Regional Director for Region 21, after being duly signed by its authorized representative, shall be posted immediately upon receipt thereof and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

³⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

³⁷ The parties stipulated that, in the event a remedial notice is appropriate, it should appear in the English, Spanish, Japanese, and Korean languages. In agreement with the parties I am convinced that, because a significant portion of Respondent's employees speak only one of the above languages, it is necessary and appropriate that notices be printed and posted in each language. *Northridge Knitting Mills, Inc.*, 223 NLRB 230 (1976).

³⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(e) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER RECOMMENDED that the Union's objections to the election be sustained, and the results of the

election be set aside and that Case 21-RC-15974 be remanded to the Regional Director for Region 21, consistent with the recommendations contained in the portion of this Decision entitled "The Union's Objections."